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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1288

LIBERTY MUTUAL INSURANCE COMPANY,
A CORPORATION,

Petitioner,

vs.

SANDRA WETZEL AND MARI ROSS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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SANDRA WETZEL AND MARI ROSS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Liberty Mutual Insurance Company (herein "Liberty") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on January 23, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals (A1-34) is officially reported at 508 F. 2d 239. The opinion of the District Court (A35-66) is reported at 372 F. Supp. 1146. Other opinions (unpublished) of the District Court in this case which are relevant to this petition are: Memorandum and Amended Order of March 19, 1974 (A67-68); Memorandum Order on Pending

Matters of December 6, 1973 (A74-78); Memorandum Order of September 14, 1972 (A72-73); and Memorandum Order on Plaintiffs' Motion to Determine Class Action of August 16, 1972 (A69-71).

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit (A33) was entered on January 23, 1975, with an amended judgment (A34) being subsequently entered on February 14, 1975. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a class action, in which the final relief relates predominantly to money damages, must be maintained under Rule 23(b)(3) FRCiv.P and comply with the procedural safeguards of that provision, or may these safeguards be disregarded by proceeding under Rule 23(b)(2)?
2. Whether due process requires notice to absent class members in a Rule 23(b)(2) class action?

STATUTE INVOLVED

The relevant provisions of Rule 23, Federal Rules of Civil Procedure ("FRCP") and of Title VII of the Civil Rights Act of 1964 (42 U. S. C. § 2000e *et seq.*) are set forth in the Appendix (A79-81).

STATEMENT OF THE CASE

A crucial question to the federal court's administration of class action suits is whether the Rule 23(b)(3) procedural safeguards[1] for an action seeking money damages may be cir-

1. Rule 23(c)(2) FRCP (A80), provides for the following procedural safeguards to members of a 23(b)(3) class action; notice to all members advising them that, if they request, the court will

cumvented by allowing that action to proceed under Rule 23(b)(2). Equally crucial is the important question left undecided by this Court in *Eisen* v. *Carlisle and Jacquelin*, 417 U. S. 156 (1974): whether due process requires notice to absent class members in a (b)(1) or (b)(2) class action. The Third Circuit in ruling upon these two issues recognized that this case "raises significant questions concerning the management of class actions brought under Title VII of the Civil Rights Act of 1964." (A1). However, these two issues, as well as the Third Circuit's decision, have far reaching ramifications to *all* class action suits.

Liberty Mutual Insurance Company is a casualty insurance company with offices throughout the United States. In 1971, Sandra Wetzel and Mari Ross, who at that time were employed as claims representatives in Liberty's Pittsburgh, Pennsylvania office, filed charges of sex discrimination with the Equal Employment Opportunity Commission ("EEOC"). Upon issuance of right to sue letters, Wetzel and Ross commenced a nationwide class action suit, alleging that Liberty had violated Title VII by discriminating on the basis of sex with respect to its hiring, promotion, wages and pregnancy-related policies.[2]

In their motion and memorandum for class action determination, Wetzel and Ross urged the District Court to certify, pursuant to Rule 23(b)(2) and (b)(3), a class consisting of all past, present and future female technical employees employed in Liberty's claims department since July 2, 1965. In response, the District Court issued an Order on August 16, 1972 (A69-

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exclude them from the class, that the judgment will include all members not requesting exclusion, and that they may enter an appearance through their own counsel.

2. The claim with respect to Liberty's pregnancy-related policies was the subject of a separate appeal (No. 74-1233), which the Third Circuit decided not to consolidate with the present case. The claim with respect to wages has been recently tried on its merits and is awaiting briefing. Accordingly, neither of these claims will be discussed in this petition.

71), holding, *inter alia*: that the suit was maintainable as a (b)(2) class action with respect to only present and future employees, since any declaratory or injunctive relief would be of benefit to only them; that past employees would not be included in the class; and that the parties could submit to the Court a proposed notice to be sent to the class. Thereafter, Wetzel and Ross submitted their proposed notice to the class, which the District Court subsequently rejected in its Order of September 14, 1972 (A72-73), on the basis that it had not determined that the suit was a (b)(3) class action.

Subsequent to filing a motion for summary judgment on March 26, 1973, Wetzel and Ross filed a motion seeking to amend the class to include past employees and to have their action certified pursuant to 23(b)(3). In response thereto, the District Court, in its Memorandum Order of December 6, 1973 (A74-78), again declined to certify the class as a (b)(3) action and to afford the procedural safeguards of that provision to the members of the class. The Court acknowledged the contention that "the primary purpose of this action is not the securing of injunctive or declaratory relief but is the recovery of money damages and, therefore, 23(b)(2) treatment is inappropriate" (A74-75), but chose to avoid resolving this dispute by permitting the action to proceed under (b)(2). The Court amended its class determination to include past female technical employees, but again declined to notify absent members of the class who, to date, have never received notice of this action.

On January 9, 1974, the District Court issued its decision on the summary judgment motion (A35-66), holding, *inter alia*, that Liberty's previous hiring and promotion policies had violated Title VII with respect to the certified class.[3] The Court, however, declined to order any injunctive relief with respect to these policies because Liberty had changed them prior to the

3. The District Court decided to consider the issue of remedy in a separate proceeding from its determination of the liability issue. To date, there have been no proceedings held on the remedy issue.

commencement of this case. Upon the certification of that decision as a final order (A67-68), Liberty appealed to the Third Circuit.

On January 23, 1975, the Third Circuit issued its decision (A1-32), finding that the District Court had not erred in allowing the action to be maintained under 23(b)(2) rather than (b)(3). The Court of Appeals rejected Liberty's contention that the explicit language of (b)(2), as well as the Advisory Committee Note to that provision, prohibits the use of (b)(2) when, as here, the appropriate final relief relates exclusively or predominantly to money damages.[4] The Court ruled that (b)(2) is applicable to a Title VII class action for back pay, which it held not to be an action for money damages, but an action for "equitable relief." (A16-17). The Court further held that an action maintainable under both (b)(2) and (b)(3) should proceed under (b)(2) to enjoy its "superior res judicata effect" and "to eliminate the procedural complications of (b)(3)." (A20).

Significantly, the Court of Appeals also held that due process did not require notice in a (b)(2) class action. Expressly disagreeing with the numerous holdings of other Circuits that due process required notice, it held that due process in class action suits was fully satisfied by the sole criterion of adequacy of representation, citing *Hansberry* v. *Lee*, 311 U. S. 32 (1940).

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4. The District Court found (A44-45, 63 & 65-66), and the Third Circuit concurred (A2 & 16), that Liberty had changed the alleged discriminatory policies *prior* to the commencement of this action, and that injunctive and corresponding declaratory relief were therefore inappropriate.

REASONS FOR GRANTING THE WRIT

1. Substantial Conflict Exists Among the Federal Courts as to Whether a Class Action Predominantly for Money Damages May Be Maintained Under Rule 23(b)(2), Rather Than 23(b)(3), and This Court Should Resolve This Important Issue Which Is Vital to the Administration of Class Action Suits.

There is presently a substantial conflict among the various Courts of Appeals and District Courts as to whether to treat a class action for money damages as a 23(b)(2) or 23(b)(3) class action. The importance of this issue is underscored by the significantly different requirements and procedures set forth for each of these provisions by the drafters of revised Rule 23. Thus, in a (b)(3) action, the court must find, based on certain specified criteria, that questions of law or fact common to the class predominate over questions affecting only individuals, and that a class action is superior to other available methods of adjudication. In contrast, in a (b)(2) action, the court must find that the party opposing the class has acted or refused to act on grounds generally applicable to the class, which would make appropriate final injunctive or corresponding declaratory relief. While members of a (b)(3) class are expressly given individual notice of the pending action, which informs them of their right to request to be excluded from the class, and to enter an appearance through their own counsel, members of a (b)(2) class are *not* expressly granted such rights. Accordingly, while matters brought under either of these provisions are generically denominated as "class actions", it is clear that there is substantial differences between the procedures to be followed and the types of cases which may be brought under each of these sections.

The factual situation in the present case, where injunctive and corresponding declaratory relief are inappropriate, exists in a substantial number of other Title VII cases and is likely to

recur in significantly more cases in the future. Contrary to cases arising in the early years of Title VII, most employers have either ceased their alleged discriminatory policies, or, as here, now have done so after charges were filed but prior to the initiation of any lawsuit.[5] Consequently, a significant number of current Title VII lawsuits concern only the issue of monetary damages for past discrimination. When such suits take on the mantle of a class action, important and recurring questions arise as to the format of that action and the procedure to be followed. There is presently a severe dislocation in the administration of Title VII class actions throughout the country, and the courts, as well as the parties, urgently need guidance from this Court on the procedure to follow in such cases.[6] The lack of definitive guidelines has created an administrative nightmare for the federal judiciary with respect to Title VII as well as all other types of class actions, and has resulted in the utilization of widely differing

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5. "[T]he basic philosophy of (Title VII) is that voluntary compliance is preferable to court action and that efforts should be made to resolve . . . employment rights by conciliation both before and after court action." *Dent* v. *St. Louis-San Francisco Railway Company*, 406 F. 2d 399, 402 (5th Cir. 1969), *cert. den.* 403 U. S. 912 (1971).

6. An example of this urgent need is set forth in *Freeman* v. *Motor Convoy, Inc.*, 9 FEP Cases 89, 93 (N. D. Ga. 1974), where the District Court, after attempting to analyze the various conflicting and often confusing precedent on this issue, concluded that "it is apparent that the issue must ultimately be resolved by the Supreme Court." There has also been extensive legal commentary on the procedural problems inherent in such actions. See e.g., Edwards, *The Back Pay Remedy in Title VII Class Actions: Problems of Procedure*, 8 Ga. L. Rev. 781 (1974); Comment, *Back Pay in Class Actions and Pattern or Practice Suits Under Title VII of the Civil Rights Act of 1964*, 23 Emory L. J. 163 (1974); Comment, *Award of Class-Wide Back Pay Is Appropriate in Private Employment Discrimination Action*, 5 Cumber.-Sam. L. Rev. 347 (1974); Note, *The Tentative Settlement Class and Class Action Suits Under Title VII of the Civil Rights Act*, 72 Mich. L. Rev. 1462 (1974); *Gardner, The Development of the Substantive Principles of Title VII Law: The Defendant's View*, 26 Ala. L. Rev. 1 (1973) and Davidson, *"Back Pay" Awards Under Title VII of the Civil Rights Act of 1964*, 26 Rutgers L. Rev. 791 (1973).

procedures depending solely upon the particular judge assigned to the case.[7]

The lack of uniformity in the administration of Rule 23 was dramatically demonstrated in the present case where the Third Circuit rejected the explicit and unambiguous language of 23(b)(2), and held that this provision does *not* mean that "(b)(2) actions are limited to final injunctive relief or declaratory judgments only." (A16) In addition, the Court also disregarded the specific admonition of the drafters of revised Rule 23, that (b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." Advisory Committee's Note, 39 F. R. D. 69, 102 (1966).[8]

Although the Third Circuit acknowledged the present conflict in decisions of the various circuits on this critical issue, it rejected the approach of the Seventh Circuit in *Air Line Stewards* v. *American Airlines, Inc.*, 490 F. 2d 636 (7th Cir. 1973), *cert. den.* 94 S. Ct. 2406 (1974), to treat Title VII class actions for back pay as only (b)(3) actions, and instead adopted the position of the Fifth and Fourth Circuits,[9] to allow such actions to proceed under (b)(2). The Court below adopted as its

7. See Justice Black's dissent from the adoption of the 1966 amendments to the FRCP, in which he expressed concern that the lack of sufficiently intelligible standards in Rule 23 would result in giving district judges power without bounds. Order of Feb. 28, 1966, 388 U. S. 1031, 1032 (1966).

8. See also Wright, *Class Actions*, 47 F. R. D. 169, 178 (1969). Furthermore, the Court ignored the significant fact that Wetzel and Ross had actively sought to maintain their action under the provisions of (b)(3), and to accord the procedural safeguards of that section to the members of the class.

9. The Third Circuit relied on the following cases as a basis for this decision: *Franks* v. *Bowman Transp. Co.*, 495 F. 2d 398 (5th Cir. 1974), *cert. den.*, 95 S. Ct. 625 (1974); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F. 2d 211 (5th Cir. 1974); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F. 2d 1364 (5th Cir. 1974); and *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791 (4th Cir. 1971), *pet. for cert. dismissed*, 404 U. S. 1006 (1971).

rationale the position of the Fifth Circuit, that an action for back pay is not an action for monetary damages since such relief is "essentially equitable in nature." This attempted semantic distinction is indeed questionable, [see *Curtis* v. *Loether*, 415 U. S. 189, 197 (1974)], and is particularly dubious in light of recent decisions which severely limit the District Court's discretion *not* to award back pay.[10] An action in which the predominant or exclusive appropriate relief is back pay, such as the present case, can only be accurately and realistically classified as an action for monetary damages. Accordingly, such Title VII actions, as all other types of class actions seeking money damages,[11] must meet the requirements and follow the procedures of (b)(3),[12] and not (b)(2).

The "procedural complications" of a (b)(3) action, which the Third Circuit indicated that it sought to avoid, are vital substantive rights which were carefully drafted to meet the specific needs of members of such a class. As in *Eisen*, these important rights, which have been expressly granted, must not

10. *Meadows* v. *Ford Motor Company*, ... F. 2d ....., 9 FEP Cases 180 (6th Cir. Jan. 24, 1975); *Franks* v. *Bowman, supra*, *Moody* v. *Albemarle Paper Co.*, 474 F. 2d 134 (4th Cir. 1973), *cert. granted*, 43 U. S. L. W. 3344 (Dec. 16, 1974) (No. 74-389).

11. See 3 Class Action Reports No. 4, p. 138 (1974), and Bennett, *Eisen* v. *Carlisle & Jacquelin: Supreme Court Calls for Revamping of Class Action Strategy*, 1974 Wis. L. Rev. 801, 824, 827 (1974).

12. Other cases requiring Title VII class actions for back pay to be maintained under (b)(3) include: *Bryan* v. *Pittsburgh Plate Glass Co.*, 494 F. 2d 799 (3rd Cir. 1974), *cert. den. sub nom. Abate* v. *Pittsburgh Plate Glass Co.*, 95 S. Ct. 184 (1974), which the Third Circuit failed to distinguish; *Charpliwy* v. *Uniroyal Inc.*, 7 FEP Cases 343 (N. D. Ind. 1974); *Gerstle* v. *Continental Airlines, Inc.*, 50 F. R. D. 213 (D. Colo. 1970); *aff'd*, 466 F. 2d 1374 (10th Cir. 1972); *Newmon* v. *Delta Airlines Inc.*, 374 F. Supp. 238 (N. D. Ga. 1973); *Manning* v. *General Motors Corp.*, 3 FEP Cases 104 (N. D. Ohio 1972), *aff'd sub nom.; Manning* v. *Automobile Workers*, 466 F. 2d 812 (6th Cir. 1972), *cert. den. sub nom., Manning* v. *General Motors*, 410 U. S. 946 (1973); *Williams* v. *Mumford*, 6 FEP Cases 483 (D. D. C. 1973); and *Paddison* v. *Fidelity Bank*, 60 F. R. D. 695 (E. D. Pa. 1973).

be sacrificed in the name of procedural expediency. The resolution of this issue will, of course, affect substantive rights in *all* class actions, not just Title VII class actions. Therefore, this Court should determine this important and recurring question, in order to provide needed guidance to the federal courts and to insure uniform application of this Rule to *all* class action suits.

2. Whether Due Process Requires Notice to Absent Class Members Is an Issue of Critical Importance Which Was Expressly Left Unanswered by This Court in Eisen, and for Which There Is Presently a Substantial Conflict Among the Various Courts of Appeals.

The issue of whether due process requires notice to absent class members in a (b)(1) or (b)(2) class action was expressly left unanswered by this Court in *Eisen* v. *Carlisle and Jacquelin*, 417 U. S. 156 (1974). This question is critical to the federal courts' administration of class action suits, and, accordingly, it has been the source of extensive legal commentary,[13] and has resulted in a substantial conflict among the various Courts of Appeals.

In *Mullane* v. *Central Hanover Bank and Trust Co.*, 339 U. S. 306, 313 (1950), this Court observed that there can be no doubt that "the Due Process Clause . . . at a minimum

13. See e.g.: Recent Development, *Eisen III*, 73 Colum. L. Rev. 1641 (1973); Comment, *Eisen—A Strict Approach*, 1973 Utah L. Rev. 389 (1973); Miller, *Problems of Giving Notice in Class Actions*, 58 F. R. D. 313 (1973); Comment, *"Eisen"*, 54 B. U. L. Rev. 111 (1974); Comment, *Federal Class Action Rule Held to Require Notice*, 5 Loyola U. L. J. (Chi.) 264 (1974); Comment, *Adequate Representation, Notice and the New Class Action Rule*, 116 U. Pa. L. Rev. 889 (1968); Note, *Notice and Manageability Requirements Interpreted*, 48 Tul. L. Rev. 721 (1974), McCall, *Due Process and Consumer Protection*, 25 Hasting L. J. 1351 (1974); Comment, *The Notice Requirement in Class Actions*, 27 Okla. L. Rev. 70 (1974); Note, *Managing the Large Class Action*, 87 Harv. L. Rev. 426 (1973).

require[s] . . . notice and [an] opportunity for hearing."[14] Commenting further, this Court stated that:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections". *Mullane*, 339 U. S. at 314.

The Second Circuit has relied upon this language in *Mullane* to hold that notice is required as a matter of due process in *all* class action suits,[15] and this position has also been adopted in the Fifth, Sixth and Seventh Circuits.[16] In sharp contrast, the Third Circuit, by the decision below, now joins the First and

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14. This Court, in other circumstances, has continually reaffirmed the principle that due process requires at a minimum notice and an opportunity to be heard. See e.g. *Goss* v. *Lopez*, 43 U. S. L. W. 4181 (Jan. 22, 1975); *Fuentes* v. *Shevin*, 407 U. S. 67 (1972); *Boddie* v. *Connecticut*, 401 U. S. 371 (1971); *Goldberg* v. *Kelly*, 397 U. S. 254 (1970); *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969); *Armstrong* v. *Manzo*, 380 U. S. 545 (1965); and *Schroeder* v. *New York*, 371 U. S. 208 (1962).

15. See *Eisen* v. *Carlisle and Jacquelin*, 391 F. 2d 555, 568 (2nd Cir. 1968); *Lopez* v. *Wyman*, 329 F. Supp. 483 (W. D. N. Y. 1971), *aff'd*, 404 U. S. 1055 (1972); *Zachary* v. *Chase Manhattan Bank*, 52 F. R. D. 532 (S. D. N. Y. 1971); *Lynch* v. *Sperry Rand Corp.*, 62 F. R. D. 78 (S. D. N. Y. 1973); and *Bormann* v. *L. I. Press Publishing Co.*, 379 F. Supp. 950 (E. D. N. Y. 1974).

16. Contrary to the Third Circuit's characterization of this conflict in Circuits as an aberration, these Circuits have consistently held that due process requires notice in all class actions. See e.g., the Seventh Circuit: *Schrader* v. *Selective Service System*, 470 F. 2d 73 (7th Cir. 1972), *cert. den.* 409 U. S. 1085 (1972); *McCarthy* v. *Director of Selective Service System*, 322 F. Supp. 1032 (E. D. Wis. 1970), *aff'd per curiam*, 460 F. 2d 1089 (7th Cir. 1972); and *Rota* v. *B. R. A. C.*, 64 F. R. D. 699 (N. D. Ill. 1974); the Fifth Circuit: *Pasquier* v. *Tarr*, 318 F. Supp. 1350 (E. D. La. 1970), *aff'd per curiam on other grounds*, 444 F. 2d 116 (5th Cir. 1971); and the Sixth Circuit: *Zeilstra* v. *Tarr*, 466 F. 2d 111 (6th Cir. 1972); *Branham* v. *General Electric Company*, 63 F. R. D. 667 (M. D. Tenn. 1974); and *Alexander* v. *Avco Corp.*, 380 F. Supp. 1282 (M. D. Tenn. 1974).

Fourth Circuits[17] in rejecting the view that due process requires notice to absent class members.[18] This substantial and significant conflict in Circuits over the basic rights guaranteed by the Constitution must be settled by this Court[19] in order that individuals may be properly apprised of and accorded the full scope of their due process rights.

The Third Circuit's reliance on *Hansberry* v. *Lee*, 311 U. S. 32 (1940), for the proposition that due process in a (b)(2) action is satisfied solely by adequacy of representation is, as this Court has stated, a "view [which] has little to commend it." *Eisen*, 417 U. S. at 176. Adoption of this proposition would result in countless individuals having their rights determined by actions of which they are completely unaware, in a forum not of their choosing, which have been litigated by counsel who might be contrary to their preferences. This unjust situation is exactly what the constitutional guarantee of due process is intended to avoid.

The refusal to notify absent class members also results in substantial prejudice to the rights of the party opposing the class. For it can be reasonably expected that in many such

17. *Yaffe* v. *Powers*, 454 F. 2d 1362 (1st Cir. 1972) and *Hammond* v. *Powell*, 462 F. 2d 1053 (4th Cir. 1972).

18. Significantly, this decision also rejects *sub silentio* the Third Circuit's previously announced approach in *Greenfield* v. *Villager Industries, Inc.*, 483 F. 2d 824, 833-844 (3rd Cir. 1973), where it held that "the notice procedures utilized in class actions are of constitutional significance and must themselves be viewed in due process terms", and that "constitutionally mandated notice which is inadequate under the circumstances may be as fatal to due process as no notice at all."

19. See Sachnoff and Solovy, *Notice in 23(b)(1) and 23(b)(2) Class Actions*, 121 Chicago Daily Law Bulletin, No. 30 (Feb. 12, 1975) pp. 1 and 3, where the authors state that "In view of these divergent views by the courts and commentators, it is apparent that resolution of the issue whether under due process standards notice is required to all class members in (b)(1) and (b)(2) classes will have to wait a definitive ruling by the Supreme Court."

cases dissatisfied members of the class[20] will seek to attack the binding effect of a decision on the basis of their lack of notice. This will result in substantially undermining the goals of Rule 23, which is intended to avoid multiplicity of litigation and to prevent estoppel which is not mutual.[21]

In view of the above, it is clear that there is presently an overwhelming urgency, on behalf of the courts and individuals, that this crucial question be finally resolved by this Court.

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20. The Third Circuit's decision was obviously influenced by the fact that the class had prevailed on the liability issue, although the question of what relief, if any, has yet to be determined. However, this myopic approach ignores the specific *caveat* by Judge Godbold (specially concurring) in *Johnson* v. *Georgia Highway Express, Inc.*, 417 F. 2d 1122, 1126-1127 (5th Cir. 1969), that a court must consider the "catastrophic consequences" of applying this same rule to cases where the representative fails to prevail in a Title VII class action, and his suggestion that due process must be accorded to all members of the class, regardless of the ultimate outcome of the case.

21. The possibility of such a result is even more probable in the present case, where the District Court continually refused the class representatives' requests to avoid due process problems by sending notices to absent class members. If the dissenting members of the class were to prevail, it would result in allowing what Rule 23 was designed to prevent, one-way intervention and estoppel which is not mutual. See *Katz* v. *Carte Blanche Corp.*, 496 F. 2d 747, 759 (3rd Cir. 1974) (*en banc*), *cert. den.* 43 U. S. L. W. 3197 (1974); *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538, 547 (1974); Advisory Committee's Note, 39 F. R. D. 105-106; Note, *Collateral Estoppel of Nonparties*, 87 Harv. L. Rev. 1485, 1496-1497 (1974); and Note, *Collateral Attack On The Binding Effect of Class Action Judgments*, 87 Harv. L. Rev. 589 (1974). See also *Blonder-Tongue Labs* v. *University of Ill. Foundation*, 402 U. S. 313, 339 (1971), regarding the issue of collateral estoppel for absent parties.

CONCLUSION

For all the foregoing reasons, Liberty respectfully prays that this petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 74-1515

SANDRA WETZEL and MARI ROSS, on behalf of themselves and all others similarly situated, Equal [Employment] Opportunity Commission as amicus curiae,

vs.

LIBERTY MUTUAL INSURANCE COMPANY, a corporation,
Appellant.

(D. C. Civil Action No. 72-169)

Appeal from the United States District Court
For the Western District of Pennsylvania

Argued October 30, 1974
Before STALEY, ALDISERT and ROSENN, *Circuit Judges*

OPINION OF THE COURT

(Filed January 23, 1975)

ROSENN, *Circuit Judge*

This appeal raises significant questions concerning the management of class actions brought under Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.* (1970), *as amended* Equal Employment Opportunity Act of 1972, 42 U. S. C. § 2000e *et seq.* (Supp. II, 1972).

Appellant, Liberty Mutual Insurance Company (Liberty Mutual), is a casualty insurance company with offices throughout the country. Both men and women are employed in the claims department of these offices in what the appellant terms a "technical" capacity. Within its claims department are adjusters and representatives, each of whose basic functions is the application of the necessary technical skills to investigate and bring about the proper disposition of claims against the company. While each is an entry level position open to college graduates, the salary of a claims adjuster is considerably higher than that of a claims representative. The possibilities for promotion are unlimited for the claims adjuster; they are severely limited for the claims representative. Before the filing of charges in this case by the appellees, Sandra Wetzel and Mari Ross, the position of claims adjuster was staffed predominantly by males; the position of claims representatives was staffed predominantly by females.[1]

Wetzel and Ross were employed as claims representatives in the Pittsburgh office of the company. Both desired the higher paying adjuster's position but were informed by the Company that it was not open to women. Dissatisfied with the Company's policies, they filed charges of sex discrimination with the Pennsylvania Human Relations Commission (PHRC) on May 11, and with the Equal Employment Opportunity Commission (EEOC) on May 14, 1971.

The filing of these charges apparently led the Company to reassess its policies concerning these positions. In August, 1971, the Company decided to recruit women to become claims adjusters and reviewed its roster of claims representatives to ascertain if any such representatives were interested in, and qualified for, the position of claims adjuster. This decision eventually led to the hiring of approximately 10% of the claims representatives as claims adjusters.

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1. The differences in Liberty Mutual's hiring and promotional practices as to claims representatives are set out in greater detail, *infra* at pp. 28-30.

After the filing of the charges with PHRC, the Company offered Wetzel and Ross positions as claims adjusters. Because of information which they had received from PHRC concerning back pay, and because of their belief that the job offer was accompanied by unacceptable conditions, they rejected the offer. Since PHRC had failed to conciliate the parties, Wetzel and Ross were issued right to sue letters by the EEOC. On February 28, 1972, Wetzel and Ross commenced a class action alleging that the Company's hiring and promotion policies and its pregnancy related policies as to the female technical employees in its claims department violated Title VII. They further alleged that the Company's policy of paying higher salaries to claims adjusters than to claims representatives violated the Equal Pay Act of 1963, 29 U. S. C. § 206(d) (1970).

In response to Wetzel's and Ross' motions, the district court, on August 16, 1972 ordered that the suit was maintainable as a class action[2] under Rule 23(b)(2) and that the class would include "all present and future female technical employees in the defendant's claim department without limitation to territory in the entire geographical area where defendant does business." On September 14, 1972, the court refused to require notices to be sent to the proposed nationwide class and declined to maintain the class under Rule 23(b)(3). In its final order of December 6, 1973, the court amended the class to include former, as well as present and future female technical employees, and reaffirmed its determination to maintain the class under Rule 23(b)(2), rather than Rule 23(b)(3). The court acknowledged, however, that the class was maintainable under either subsection. It also saw "no immediate necessity of the class action notice required of actions proceeding under Fed. R. Civ. P. 23(b)(3)." No notice had been sent to any members of the class as of the date of this appeal.

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2. All references to rules are references to the Federal Rules of Civil Procedure.

On March 26, 1973, Wetzel and Ross moved for partial summary judgment.[3] Counsel for both sides agreed that the equal pay claim was not susceptible to summary judgment treatment because disputed issues of fact existed as to whether the work performed by claims representatives was equivalent to that performed by claims adjusters. On January 9, 1974, the court entered an interlocutory order that the pregnancy related policies of the Company violate Title VII, "are continuing violations and are the proper subject of injunctive relief." On February 20, 1974, the district court rendered final the interlocutory order. A notice of appeal was filed and was docketed at No. 74-1233. That appeal is presently before another panel of this court and the issues in that appeal do not concern us here.

The district court in its interlocutory order of January 9, 1974, also ruled that the hiring and promotion policies of the Company violated Title VII, but denied injunctive relief[4] "[b]ecause the evidentiary materials show that at certain times subsequent to the filing of the administrative charge or the within Complaint the Defendant has ceased or discontinued the discriminatory practice[s]."[5] In an unsuccessful attempt to avoid piecemeal appeals, the court, on March 19, 1974, rendered final this part of the interlocutory order. In this appeal, Liberty Mutual has asked us to review the district court's management of the class action and its granting of summary judgment against the challenged hiring and promotion policies.

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3. Only the question of liability was to be decided at that time. Determination of the relief to be granted was left for further proceedings.

4. The opinion of the district court is reported at 372 F. Supp. 1146 (W.D. Pa. 1974).

5. *Id.* at 1163.

I

A. Jurisdiction

Preliminarily, we note that, despite Wetzel's and Ross' contentions, we have jurisdiction to review the class action aspects of this case. The district court, pursuant to Rule 54(b), rendered final the partial summary judgment as to the Company's hiring and promotion policies on March 19, 1974. The determination of the class became final for the purposes of 28 U. S. C. § 1291 at that time. The notice of appeal, filed April 15, 1974, was timely as to all aspects of that judgment, including the determination of the affected class.

B. Scope of Review

Before examining Liberty Mutual's contentions, we must first decide the appropriate scope of review of the district court's actions. The extent of the scope of review is of the utmost importance for, in some instances, it effectively determines whether the actions of the district court will be sustained. Lengthy deliberations on the subject are not necessary, however, because the question is settled in this circuit by the recent case of *Katz* v. *Carte Blanche Corp.*, 496 F. 2d 747 (3d Cir.) (en banc), cert. denied, 43 U. S. L. W. 3197 (October 15, 1974), in which Judge Gibbons wrote:

> [The scope of review] will depend to some extent upon which facet of the multi-faceted determination is challenged on appeal. The district court must determine if the four prerequisites for a class action listed in rule 23(a) have been met. These are mandatory requirements, and our review decides whether the mandates have been met. The district court must also determine whether the class action is maintainable under rule 23(b)(1) or (2) so that it may proceed without notice to or identification of the class members. Our review will determine whether the court properly classified the type of class action in reaching its decision as to class action treatment.

Id. at 756 (citations omitted). Inasmuch as the district court appropriately applied the criteria of Rule 23(a), the scope of our review is whether the trial court did abuse its broad discretion.[6]

II

The mandatory requirements of Rule 23(a)[7] must first be met to maintain a class action. Liberty Mutual has made numerous attacks on the determination made by the district court that the requirements of 23(a) had been met. After careful consideration of its contentions, we need to discuss only two.

First, Liberty Mutual contends that it was error to include in the class all female technical employees who had been employed since July 1, 1965. It contends that employees whose claims are time barred by the statute of limitations contained in

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6. The scope of review is summarized by Professor Moore:

> In determining whether an action brought as a class action is to be so maintained the trial court should carefully apply the criteria, set forth in Rule 23 . . . , to the facts in the case; and if it fails to do so its determination is subject to reversal by the appellate court when the issue is properly before the latter court. On the other hand, where the trial court does apply the Rule's criteria to the facts of the case, the trial court has [a] broad discretion in determining whether the action may be maintained as a class action and its determination should be given great respect by a reviewing court.

3B *J. Moore, Federal Practice* ¶ 23.50 at 1104-05 (2d ed. 1974), quoted with approval in Katz v. Carte Blanche Corp., 496 F. 2d at 757.

7. Rule 23(a) provides:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

then section 706(d) of Title VII, 42 U. S. C. § 2000e-5(d) (1970), should be excluded from the class.[8]

We agree with Liberty Mutual that such individuals should have been excluded. At the time charges were filed with the EEOC, section 706(d) provided that where, as here, a charging party had instituted proceedings with a state agency which has jurisdiction over discriminatory employment practices, a charge must be filed with the EEOC within 210 days of the occurrence of the alleged unfair practice.[9]

As stated in *Macklin* v. *Spector Freight Systems, Inc.*, 478 F. 2d 979, 986 (D. C. Cir. 1973):

> Since a suit in court depends on an agency notice to sue letter and since the agency cannot take the case initially unless the timely filing requirements are met, the timely filing requirements with respect to EEOC appears to be a jurisdictional prerequisite to court action under Title VII.

A plaintiff may bring a class action on behalf of those who have not filed charges with the EEOC. *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711, 719-20 (7th Cir., 1969); *Oatis* v. *Crown Zellerbach Corp.*, 398 F. 2d 496, 499 (5th Cir. 1968). This tolls the statute of limitations for all members of the class. *American Pipe & Construction Co. v. Utah*, 414 U. S. 538 (1974). But Wetzel and Ross cannot represent those who could not have filed a charge with the EEOC at the time they filed their charges. *CWA* v. *New York Telephone Co.*, 8 F. E. P. 509, 513 (S. D. N. Y. 1974); *Culbert* [*sic*] v. *General Electric Co.*, 5 F. E. P. 969, 993 (E. D. Va. 1973); *Garneau* v. *Raytheon Co.*, 3 F. E. P. 1315 (D. Mass. 1971).

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8. Since the filing of a charge with the EEOC is a jurisdictional requirement, we may consider the issue here although Liberty Mutual did not raise it in the district court.

9. The Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4, 86 Stat. 104 (March 24, 1972), extended the time for filing in such cases to 300 days and renumbered § 706(d) as § 706(e). The effective date of the amendment was March 24, 1972, after the filing of the complaint in the district court.

This conclusion does not mean, however, as Liberty Mutual contends, that the numerosity requirement of 23(a)(1) has not been met. Wetzel's and Ross' charges alleged the maintenance of discriminatory hiring and promotion policies up to the time of the filing of their complaint. Such policies are continuing violations of Title VII and would allow a filing of a charge at any time by a present employee. *Macklin* v. *Spector Freight Systems, Inc., supra* at 987-88. The only employees barred from the class are those who left the employ of the Company more than 210 days before the filing of the charges with the EEOC by Wetzel and Ross. The class will be larger than the approximately seven hundred female technical employees presently employed by Liberty Mutual, meeting the numerosity requirement of 23(a)(1). Of course, in the determination of the relief to which members of the class will be entitled, the district court should take into account the modification of the class required by section 706(d).

The second attack on the district court's determination that the conditions of Rule 23(a) have been met is the contention that Wetzel and Ross were not adequate representatives of the class as required by Rule 23(a)(4).

Adequate representation depends on two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class. *Eisen* v. *Carlisle & Jacquelin*, 391 F. 2d 555, 562 (2d Cir. 1968).

Liberty Mutual does not dispute the district court's finding as to the competency of counsel but it does object to the court's finding of "no conflict or antagonism between Wetzel's and Ross' claims and the claims of the class." Liberty Mutual contends that employees, such as Wetzel and Ross, who have voluntarily severed their employment prior to suit cannot adequately represent members of the class who are presently employed by the

company. We note the existence of a dispute as to whether Wetzel's and Ross' termination of employment was, in fact, voluntary, but we will assume, *arguendo*, that they voluntarily severed their employment.

We believe that a former employee, who is not entitled to reinstatement, may still be an adequate representative of a class of past and present employees alleging discriminatory employment practices.[10] Whether a party adequately represents a class depends on all the circumstances of the particular case. 3B *J. Moore, Federal Practice*, ¶ 23.07[1] (2d ed. 1974) (hereinafter cited as *Moore*). That a person is no longer employed with a company and is not entitled to reinstatement is but one of the circumstances to be considered in the determination of whether Rule 23(a)(4) has been met. In fact, as the court observed in *Mack* v. *General Electric Co.*, 329 F. Supp. 72, 76 (E.D. Pa. 1971), with respect to plaintiffs who were former employees of the company, "being familiar with [the company's] employment practices and being free from any possible coercive influences of [the company's] management, [the plaintiffs] are better situated than either job applicants or present employees to present an intelligent and strongly adverse case against [the company's] alleged discriminatory practices." Moreover, were the position advanced by Liberty Mutual adopted, employers would be encouraged to discharge those employees suspected as most likely to initiate a Title VII suit in the expectation that

10. A former employee has standing to bring such a suit. Hackett v. McGuire Bros., Inc., 445 F. 2d 442 (3d Cir. 1971).

We are aware that, in a similar situation, the Sixth Circuit has reached the opposite conclusion. Heard v. Mueller Co., 464 F. 2d 190 (6th Cir. 1972). However, in *Heard* the former employee attempted to represent a class of present and prospective employees only. Here the class includes past employees as well. Further, the court in *Heard* decided that the company's employment practices were not discriminatory before deciding the class action issue. Here, of course, no such determination was made. Finally, the only support for the holding in *Heard* was Huff v. N. D. Cass Co., 468 F. 2d 172 (5th Cir. 1972), which was subsequently reversed in Huff v. N. D. Cass Co., 485 F. 2d 710 (5th Cir. 1973) (en banc).

such employees would thereby be rendered incapable of bringing the suit as a class action. *Reed* v. *Arlington Hotel Co.*, 476 F. 2d 721 (8th Cir.), *cert. denied*, 414 U. S. 854 (1973).

In the present case, the district court specifically found that the requirements of Rule 23(a)(4) have been met. The interests of Wetzel and Ross in combatting the sexually discriminatory policies of the Company surely are coextensive with all female technical employees, whether formerly or presently employed. We do not perceive any interests of the former employees antagonistic to those of the present employees. The relief to be granted by the district court,[11] whether it takes the form of back pay, mandatory hiring of female claims adjusters, or increased promotional opportunities for women will benefit all members of the class.[12] We see no other factors revealing that the plaintiffs were not adequate representatives of the class. The district court did not abuse its discretion in holding that Wetzel and Ross adequately represented the class.

III

A. Characteristics of (b)(2) and (b)(3) actions

In addition to meeting the mandatory requirements of Rule 23(a), the class must be maintainable under either subsection

11. We intimate no opinion as to what relief, if any, is appropriate.

12. We believe that Air Line Stewards & Stewardesses Ass'n Local 550 v. American Airlines, Inc., 490 F. 2d 636 (7th Cir. 1973), *cert. denied*, ... U. S. .... (1974), upon which Liberty Mutual relies, is distinguishable because there the relief to former stewardesses (reinstatement with no loss of seniority) would have been antagonistic to the interests of stewardesses presently employed with less seniority. Here, the only group whose interests are hostile to those of the class are the male claims adjusters, and they, of course, are not members of the class.

23(b)(1), (b)(2), or (b)(3).[13] In the usual class action, the determination of whether the action should proceed as a 23(b)(2) or as a 23(b)(3) action offers little difficulty. In the present case, however, the order of the district court finding injunctive relief unnecessary as to Liberty Mutual's hiring and promotional practices in its claims department, because the Company's practices as to these issues have ceased, presents complications. Whether (b)(2) or not (b)(2) is indeed *the* question.

In the instant case, the district court found that the class could be maintained under either 23(b)(2) or 23(b)(3), but exercising its discretion decided to maintain the class under 23(b)(2). Liberty Mutual vigorously contends that the class could only be maintained under (b)(3), and that the procedural prerequisites for maintaining a (b)(3) suit have not been met. We find no error in the district court's determination that the class was properly maintainable under (b)(2).

In reviewing Liberty Mutual's contentions, it is necessary to understand the basic nature of (b)(2) and (b)(3) suits and

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13. Rule 23(b) provides:

(b) Class actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * * * *

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law, or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (a) the interest of the members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

the res judicata effects of judgments upon members of the respective classes.

A (b)(2) suit is permitted when the opposing party has acted or refused to act on grounds generally applicable to the class. Advisory Committee's Note to Proposed Amendments to Rule 23, 39 F. R. D. 69, 102 (1966) [hereinafter cited as Advisory Committee]. By its very nature, a (b)(2) class must be cohesive as to those claims tried in the class action. Note, *Managing the Large Class Action:* Eisen v. Carlisle & Jacquelin, 87 Harv. L. Rev. 426, 441 (1973). The rule recognizes that the res judicata effect of a judgment may only be tested in a subsequent action. Advisory Committee, *supra* at 106, *citing* Restatement of Judgments § 86, comment (h), § 116 (1942). Because of the cohesive nature of the class, Rule 23(c)(3)[14] contemplates that all members of the class will be bound. Advisory Committee, *supra* at 106; *C. Wright, Federal Courts* § 72, at 314 (2d ed. 1970) [hereinafter cited as *Wright*]. Any resultant unfairness to the members of the class was thought to be outweighed by the purposes behind class actions: eliminating the possibility of repetitious litigation and providing small claimants with a means of obtaining redress for claims too small to justify individual litigation.[15]

Rule 23(b)(3) permits a class action where the questions of law or fact common to the class predominate over questions only affecting individual members and the "class action is

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14. Rule 23(c)(3) provides:

> (3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

15. *See* Katz v. Carte Blanche Corp., *supra* at 759; *Wright, supra* at 306.

superior to other available methods for the fair and efficient adjudication of the controversy." While not a true successor to the "spurious" class action which existed prior to the 1966 amendments, *Wright, supra* at 312, the (b)(3) class action developed therefrom. In the spurious class action, members of the class would be bound by the judgment only if they intervened in the action. *Moore, supra* at 702. Various courts of appeals permitted intervention after a judgment favorable to the class. Many commentators objected that such one-way intervention resulted in binding the members of the class only when the class had won. To eliminate the unfairness of this one-way intervention, the Advisory Committee concluded that class members should be brought in prior to the determination of a defendant's liability, thus making the estoppel mutual. *See Katz* v. *Carte Blanche Corp., supra* at 759; Advisory Committee, *supra* at 105.

Binding all members of a (b)(3) class, however, was not thought by the Advisory Committee to be as fair as binding all members of a (b)(2) class. By the very nature of a heterogeneous (b)(3) class, there would be many instances where a particular individual would not want to be included as a member of the class.[16] To respect these individual interests, rule 23 (c)(2)[17] was written to afford an opportunity to every potential

16. An excellent example is the situation found in Katz v. Carte Blanche Corp., *supra*, in which it was alleged that Carte Blanche violated the Truth in Lending Act in its disclosure of finance charges. Assume, contrary to the decision, that a (b)(3) class was allowed to be maintained. Carte Blanche might counterclaim against the members of the class for amounts owing from use of the credit card. A delinquent account debtor may well decide that a judgment for amounts owing will outweigh any benefits he might obtain from a favorable judgment resulting from the Truth in Lending Act violation.

17. Rule 23(c)(2) provides:

> (2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will

(Footnote continued on next page)

member to opt out of the class. *See Katz* v. *Carte Blanche Corp., supra* at 759; Advisory Committee, *supra* at 104-05. For the opt out procedure to be effective, 23(c)(2) also provides for notice to be sent to all potential members prior to the final determination of the class. *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156 (1974).

With the potential unfairness to members of the (b)(3) class eliminated by the opt out procedure, 23(c)(3) contemplates that all members of the (b)(3), as well as members of the (b)(2) class, will be bound by the res judicata effect of the judgment. *Wright, supra* at 314.

B. Appropriateness of (b)(2) for this action

Liberty Mutual contends that this suit could not have been maintained as a class action under (b)(2) because such class actions are limited to only those suits in which final injunctive relief is found to be appropriate. In support of this position, Liberty Mutual relies on the language of (b)(2),[18] the comments of the drafters of the rule,[19] and the case of *Air Line Stewards & Stewardesses Association, Local 550* v. *American Airlines, Inc., supra.*[20]

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exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

18. *See* note 13 *supra.*

19. "[Subdivision (b)(2)] does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." Advisory Committee, *supra,* at 102. *See Moore, supra,* at 654.

20. Airline stewardesses had brought suit seeking injunctive relief against the airlines' policy of permanently discharging pregnant stewardesses. After the institution of the suit, the airlines eliminated the practice. The court noted:

> When the airlines ended their discharge policy, the actions became virtually moot as far as the currently employed stewardesses were concerned, and purely prospective relief against the

The district court, after discovery and extensive briefing, considered whether the action here was properly maintained under (b)(2) three separate times. In its last memorandum order of December 6, 1973, the court indicated that maintenance under (b)(2) was proper because Liberty Mutual had "'acted or refused to act on grounds generally applicable to the class' and the representative plaintiffs seek among other remedies, 'final injunctive relief or corresponding declaratory relief.'" In his opinion of January 9, 1974, Judge Weber noted:

> Because the evidentiary materials show that at certain times . . . subsequent to the filing of the administrative charge or the within Complaint the Defendant has ceased or discontinued the discriminatory practices, injunctive relief is not appropriate as to those practices.

372 F. Supp. at 1163.

The precise issue before us then is whether a district court, having determined that a Title VII suit brought in good faith for injunctive relief may be maintained under (b)(2), is required to redetermine that the suit be maintained under (b)(3) and comply with its procedural requirements once it concludes on a motion for summary judgment that changed conditions make injunctive relief no longer appropriate. We decline to so hold.

First, a Title VII suit against discriminatory hiring and promotion policies is necessarily a suit to end discrimination because of a common class characteristic, in this case sex. *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711, 719 (7th Cir. 1969); *Oatis* v. *Crown Zellerbach Corp.*, 398 F. 2d 496, 499 (5th Cir. 1968). The conduct of the employer is actionable "on grounds generally applicable to the class," and the relief sought is "relief with respect to the class as a whole." The class, all sharing

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practice of little moment. The (b)(3) character of the actions, while always present as to the discharged stewardesses, became even more obvious.

490 F. 2d at 643. For a further discussion of the case, see note 30 *infra.*

a common characteristic subjected to discrimination, is cohesive as to the claims alleged in the complaint. Thus, a Title VII action is particularly fit for (b)(2) treatment, and the drafters of Rule 23 specifically contemplated that suits against discriminatory hiring and promotion policies would be appropriately maintained under (b)(2). Advisory Committee, *supra* at 102. Since a Title VII suit is essentially equitable in nature,[21] it cannot be characterized as one seeking exclusively or predominantly money damages. *Franks* v. *Bowman Transp. Co.*, 495 F. 2d 398 (5th Cir. 1974).

The basic nature of a Title VII suit is not altered merely because the employer's change of discriminatory policy prior to the motion for summary judgment has obviated the need for injunctive relief. The conduct of the employer is still answerable "on grounds generally applicable to the class," and the relief sought is still "relief with respect to the class as a whole." The cohesive characteristics of the class are the vital core of a (b)(2) action. Functionally, these characteristics of the class are still intact in the suit. Nothing has changed to require the procedural protections of (b)(3) to determine the presence or absence of liability. The class is still appropriately maintained under (b)(2).

Second, the language of (b)(2) does not support the contention that (b)(2) actions are limited to final injunctive relief or declaratory judgments only. Rather, the language describes the type of conduct by the party opposing the class which is subject to equitable relief by class action under (b)(2). As recently stated in *Pettway* v. *American Cast Iron Pipe Co.*, 494 F. 2d 211, 257 (5th Cir. 1974):

> All that need be determined is that conduct of the party opposing the class is such as makes such equitable relief

21. "Thus, the action and the relief authorized are essentially equitable in nature. This is true not only of traditional injunctive relief which may be granted, but also of the back pay award." Franks v. Bowman Transp. Co., 495 F. 2d 398, 406 (5th Cir.), *cert. denied*, 43 U. S. L. W. 3328 (December 10, 1974).

> appropriate. This is no limitation on the power of the court to grant other relief to the established class, especially where it is required by Title VII . . . .

Liberty Mutual's policies at the time these charges were made were such that final injunctive relief was appropriate. This satisfies the language of the rule.[22] The nature of these policies, and the nature of the class opposing these policies, does not change merely because subsequent action by Liberty Mutual eliminates the need for final injunctive relief.

Moreover, although the court found that injunctive relief was unnecessary, it did determine the presence of liability on the part of Liberty Mutual. The court did not preclude the possibility of directing affirmative action,[23] in addition to back pay, to remedy conditions caused by the offensive discriminatory practices. Such affirmative action ultimately would, in effect, constitute final injunctive or declaratory relief. "No one has suggested that this [relief] violates the dictates of subdivision (b)(2)." *Pettway* v. *American Cast Iron Pipe Co., supra* at 257.

Courts have held that a (b)(2) class is appropriate in a Title VII suit where both final injunctive and monetary relief are granted. *Franks* v. *Bowman Transp. Co., supra* at 422; *Pettway* v. *American Cast Iron Pipe Co., supra* at 257; *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F. 2d 1364, 1375 (5th Cir. 1974); *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 801-02 (4th Cir. 1971), *petition for cert. dismissed*, 404 U. S. 1006 (1972); *Bowe* v. *Colgate-Palmolive Co., supra* at 720. Main-

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22. The district court in its first class action order dated August 16, 1972, stated:

> [W]e find that the defendant has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final declaratory or injunctive relief with respect to the class as a whole. Claims of sexual discrimination are particularly appropriate for such determination.

23. 372 F. Supp. at 1163. We do not suggest what relief, if any, may be appropriate.

tenance of a class action under (b)(2) in a Title VII action has also been held to be appropriate when the actions of the defendant after the complaint had been filed had obviated the need for final injunctive relief. *Arkansas Education Ass'n* v. *Board of Education*, 446 F. 2d 763 (8th Cir. 1971).

Additionally, only with the benefit of hindsight do we now know that injunctive relief against the Company's hiring and promotion practices was not necessary in this case. At the (c)(1) hearing, the district court specifically found that the conduct of Liberty Mutual made appropriate final injunctive relief.[24] Requiring the court to reconsider and possibly redetermine the class at the time of the summary judgment application and redirect the course of the litigation with notice and other procedural requirements would inevitably complicate a type of litigation which by its nature is complex at its best. For this court to compel a redetermination of the class at that point probably would require the district court to consider the merits of the case, and ultimately would lead to a practice of holding a preliminary hearing on the merits at the time of the initial (c)(1) class determination. This, of course, the Supreme Court has made clear the district court may not do:

> We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravenes the Rule . . . . [It] is directly contrary to the command of subdivision (c)(1) that the court determine whether a suit denominated a class action may be maintained as such "as soon as practicable after the commencement of [the] action . . . ."

Eisen v. *Carlisle & Jacquelin*, 417 U. S. 156, 177-78 (1974). It is at the (c)(1) hearing that the class must be shown to possess the characteristics required by (b)(2). Of course, the district court may amend its determination at a later date. *See*

24. *See* note 22 *supra*.

23(c)(1). But we decline to hold that a court must reconsider its determination when, at the decision for summary judgment, it finds injunctive relief to be inappropriate.

Finally, we have reviewed the (b)(2) issue on this appeal as if the action in the district court involved only the hiring and promotion policies of Liberty Mutual. Wetzel and Ross, however, also attacked in the district court Liberty Mutual's pregnancy related policies, and its policy of paying higher salaries to claims adjusters than to claims representatives. Due to the piecemeal nature of the appeals from the district court, the only substantive issue before us involves the hiring and promotion policies, but in the absence of the argument by Liberty Mutual that different classes should have been created for different issues,[25] we must consider the propriety of the class determination in the light of all the substantive issues raised in the district court. Liberty Mutual has changed, as a result of the charges brought by Wetzel and Ross, neither its pregnancy related policies, nor its higher salary policy to claims adjusters. In the event these policies are found to be violative of Title VII, final injunctive relief will be necessary as redress. The (b)(2) nature of the class, while visible as to the promotion and hiring issues, becomes translucent when viewed in the light of the multifaceted attack upon Liberty Mutual's policies.

Liberty Mutual also contends that if the requirements of both (b)(2) and (b)(3) are met, the court should certify the class under (b)(3) to provide the procedural protections, namely notice and opting out, which (b)(3) affords members of the class. Virtually every class action meeting the requirements of 23(b)(2) will also meet the less severe requirements of 23(b)

25. Rule 23(c)(4)(A) permits an action to be brought or maintained as a class action as to particular issues only. *See* note 28 *infra*. From our review of the record, it does not appear that Liberty Mutual had requested the district court to maintain the class under (b)(3) as to its hiring and promotion policies, while maintaining the class under (b)(2) for the other issues. In this court, Liberty Mutual has only attacked the maintenance of the class as a whole.

(3). *Van Gemert* v. *Boeing Company*, 259 F. Supp. 125, 130 (S. D. N. Y. 1966). If the actions are classified under (b)(3), members of the class could elect to opt out and thereby not be bound by the judgment. This would permit the institution of separate litigation and would defeat the fundamental objective of (b)(2), to bind the members of the class with one conclusive adjudication. *Van Gemert* v. *Boeing Company, supra* at 130-31. As discussed above,[26] the procedural protections of (b)(3), opting out and notice, are necessary because of the heterogeneity of the (b)(3) class. They are unnecessary for the homogeneous (b)(2) class.

The recent Supreme Court decision in *Eisen* v. *Carlisle & Jacquelin*, 417 U. S. 156 (1974), does not support the Company's contention. *Eisen* does not extend the (b)(3) notice requirement to (b)(2) actions, nor to actions maintainable under either (b)(2) or (b)(3). We therefore agree with the *Van Gemert* principle that an action maintainable under both (b)(2) and (b)(3) should be treated under (b)(2) to enjoy its superior res judicata effect and to eliminate the procedural complications of (b)(3) which serve no useful purpose under (b)(2). This principle has been widely adopted in the federal courts. *See Moore, supra* ¶ 23.31[3] and cases cited therein.

C. Inclusion of former and future employees

Liberty Mutual asserts that the inclusion of former employees in the (b)(2) class was an abuse of discretion because such employees, even at the time of the filing of the complaint, could only have been interested in monetary relief. It again relies on *Air Line Stewards & Stewardesses Association Local 550* v. *American Airlines, Inc., supra.*[27]

A short answer to this contention is that former employees may well be interested in the eradication of the Company's dis-

26. *See* pp. 13-15 *supra.*

27. *See* note 20 *supra.*

criminatory policies and their effect. Employees who had despaired of becoming claims adjusters, or of receiving promotions to positions higher than those of claims representative supervisor, may well desire to renew their employment with Liberty Mutual if the discriminatory practices are terminated.

Moreover, even if the former employees were interested in only monetary relief, Rule 23(c)(4)(B)[28] permits, but does not require, the district court to divide the class into appropriate subclasses. Such subdivision is required where

> the class includes . . . subclasses with divergent interests, or where certain representatives adequately represent only one group and other representatives represent another group.

Moore, supra, § 23.65 at 1251, and cases cited therein. Here, as we have observed, the interests of the former and present employees in this class action are congruent: the elimination of, and relief from, Liberty Mutual's discriminatory policies. We do not perceive any interests of the two groups which are mutually antagonistic. We also believe that the former employees can adequately represent the interests of the present employees.[29] The district court did not abuse its discretion by failing to create subclasses.[30]

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28. Rule 23(c)(4) provides:

> (4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

29. *See* pp. 9 to 11, *supra.*

30. The congruence of interests and absence of antagonism between the two groups distinguish this case from Air Line Stewards & Stewardesses Association Local 550 v. American Airlines, Inc., *supra,* both as to this issue of subclasses and the issue of whether the class was properly maintained under (b)(2). *See* pp. 15-20. In *Air Line Stewards,* American Airlines and TWA had permanently discharged stewardesses who became pregnant. The Association, certified bargaining representative for airline cabin attendants, brought suit to enjoin the practice, and after the companies terminated the

(Footnote continued on next page)

Liberty Mutual additionally contends that inclusion of future employees in the class is improper because injunctive relief has been found to be unnecessary by the district court. As noted above,[31] the district court may well conclude that affirmative relief is necessary to completely dissipate the effects of the Company's discriminatory policies. If it so finds, the inclusion of future employees in the class may be useful. However, if the court should find that such affirmative relief is unnecessary, inclusion of future employees would appear to be improper.

IV

Liberty Mutual contends that if the action maintainable under (b)(2), we should hold that notice should have been given prior to determination of liability to all members of the class, either under our supervisory powers over the circuit district courts or under the requirements of due process.[32]

Suits brought by private employees are the cutting edge of the Title VII sword which Congress has fashioned to fight a

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practices, negotiated a settlement. Objecting stewardesses appealed approval of the settlement by the district court. The appellate court noted that the Association, which was composed of active airline attendants, could not adequately represent the former attendants because the two groups had conflicting interests. The former stewardesses would desire reinstatement with no loss of seniority, leapfrogging them over less senior active stewardesses. Seniority had an important effect on promotions, trip assignments, and other aspects of employment. The court, desirous of allowing the former stewardesses to opt out of the settlement, held that a (b)(3) subclass should have been created. Here, we perceive no need for former employees to opt out.

31. *See* p. 18 *supra.*

32. There is a serious question whether Liberty Mutual, during a colloquy with Judge Aldisert, abandoned its due process contention at oral argument. We consider the contention, found in the written brief, because the colloquy is not altogether clear and because of the Company's reliance on Eisen v. Carlisle & Jacquelin, 391 F. 2d 555 (2d Cir. 1968). *Eisen's* requirement of notice in (b)(2) actions was predicated on due process not, as Liberty Mutual contended at oral argument, on the supervisory power of the court.

major enemy to continuing progress, strength, and solidarity in our nation, discrimination in employment.

> What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

Griggs v. *Duke Power Co.*, 401 U. S. 424, 431 (1971). Class actions, which allow attorneys to receive fees commensurate with time and effort expended on what often are complex and difficult litigations, are powerful stimuli to enforce Title VII. The imposition of notice and the ensuing costs often discourage such suits. *See Eisen* v. *Carlisle & Jacquelin*, 417 U. S. 156, 179 (1974). Therefore, we are reluctant to impose notice requirements under our supervisory power to Title VII (b)(2) actions unless Rule 23 so requires or unfairness will result to the parties.

Rule 23 definitely does not require mandatory notice for (b)(2) actions. By its terms,[33] the mandatory notice requirement of (c)(2) applies only to actions maintained under (b)(3).

> Whether the court should require notice to be given to members of the class to make a determination, [of whether a class should be maintained under (b)(2)] or of the order embodying it, is left to the court's discretion under subdivision (d)(2).

Advisory Committee, *supra* at 104. We will not presume to exercise supervisory powers, as urged upon us by counsel for Liberty Mutual, to mandate notice which the Federal Rules of Civil Procedure, promulgated by the Supreme Court under authority from Congress, 28 U. S. C. § 2072, specifically do not require.

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33. Rule 23(c)(2) in pertinent part provides:

> In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. . . .

Moreover in *Eisen* v. *Carlisle & Jacquelin*, 417 U. S. 156 (1974), the Supreme Court held that there should be strict adherence to the notice requirements of Rule 23(c)(2). In the light of *Eisen*, deviation from the literal requirements of the rule would be incongruous and, at the same time, would also fly in the face of its spirit. As discussed *supra*,[34] mandatory notice is required in (b)(3) actions for the effective operation of the "opt out" provision, which is essential to protect the interests of individuals in the heterogeneous group. The "opt out" procedure, however, is not necessary for the protection of interests of individuals in the homogeneous (b)(2) class. In the instant case, determination of liability on the part of Liberty Mutual to each member of the class depends on whether it discriminated on the basis of sex. This question is common to the claims of all members of the class. "In the degree that there is cohesiveness or unity in the class . . . the need for notice to the class will tend toward a minimum." Advisory Committee, *supra*, at 106. In this proceeding, the fundament for claims of each member of the class rests squarely on the same issue and the need for individual notice is superfluous.

The due process argument presents a more difficult question. Liberty Mutual primarily relies on dictum in *Eisen* v. *Carlisle & Jacquelin*, 391 F. 2d 555, 564-65 (2d Cir. 1968) that

> notice is required as a matter of due process in all representative actions, and 23(c)(2) merely requires a particular form of notice in 23(b)(3) actions. Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306 (1950).

Several courts of appeals and district courts have followed this dictum.[35] Wetzel and Ross counter with the following dictum of

34. *See* pp. 14-15 *supra*.

35. Schrader v. Selective Serv. Sys. Local Bd. No. 76, 470 F. 2d 73 (7th Cir.), *cert. denied*, 409 U. S. 1085 (1972); McCarthy v. Director of Selective Serv. Sys., 322 F. Supp. 1032 (E. D. Wis. 1970), *aff'd per curiam on other grounds*, 460 F. 2d 1089 (7th Cir. 1972); Zeilstra v. Tarr, 466 F. 2d 111 (6th Cir. 1972); Pasquier v. Tarr, 318 F. Supp. 1350 (E. D. La. 1970), *aff'd per curiam on other grounds*, 444 F. 2d 116 (5th Cir. 1971); Newman v. Avco Corp., 43 U. S. L. W. 2135 (M. D. Tenn. Sep. 6,1974).

this circuit in *Katz* v. *Carte Blanche Corp.*, 496 F. 2d 747, *supra* at 756:

> The district court must also determine whether the class action is maintainable under rule 23(b)(1) or (2) so that it may proceed without notice to or identification of the class members.

We believe that this battle of the dicta lends scant assistance to either party.[36] We believe it preferable to analyze the problem in

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36. With the exception of Newman v. Avco Corp., *supra*, the cases in the preceding footnote are suspect in their precedential value on the notice issue because of their confused procedural history.

In Gregory v. Hershey, 311 F. Supp. 1 (E. D. Mich. 1969), the district court rendered a declaratory judgment that the class before it was entitled to fatherhood deferments from Selective Service. The *Gregory* court had not provided members of the class with notice. Plaintiffs in the cases upon which Liberty Mutual relies claimed to be members of the class in *Gregory*.

Schrader v. Selective Serv. Sys. Local Bd. No. 76, 329 F. Supp. 966 (W. D. Wis. 1971), held the judgment binding despite the lack of notice. Pasquier v. Tarr, 318 F. Supp. 1350 (E. D. La. 1970), and McCarthy v. Director of Selective Serv. Sys., 322 F. Supp. 1032 (E. D. Wis. 1970), rejected plaintiff's res judicata claims by relying on the dicta in *Eisen*.

Following the decisions in the preceding paragraph, *Gregory* was reversed. The reversal of *Gregory* on the ground that the court had lacked subject matter juridiction, 436 F. 2d 513 (6th Cir.), *cert. denied*, 403 U. S. 922 (1971), sent these cases back to court and produced several new ones. *Pasquier* and *McCarthy* were affirmed on appeal but on the ground that *Gregory* was void for lack of subject matter jurisdiction. *See* McCarthy v. Director of Selective Serv. Syst., 460 F. 2d 1089 (7th Cir. 1972); Pasquier v. Tarr, 444 F. 2d 116 (5th Cir. 1971). *Schrader* was reversed because "the absolute failure to give any indicia of notice to absent members render[ed] the purported class in *Gregory* futile." Schrader v. Selective Serv. Sys. Local Bd. No. 76, 470 F. 2d 73, 75 (7th Cir.) *cert. denied*, 409 U. S. 1085 (1972). Zeilstra v. Tarr, 466 F. 2d 111 (6th Cir. 1972), reversed another district court decision holding *Gregory* binding on the grounds that *Gregory* had been void, for lack of both notice and subject matter jurisdiction.

See Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 Harv. L. Rev. 596-97 (1974), upon which the foregoing analysis is predicated.

We are inclined to believe that the courts in the above cases reached for the notice requirement as an answer to the complex res judicata effect of the class action rather than carefully considering whether due process actually requires notice to absent members of the class.

light of the policies underlying the constitutional requirement of due process.

The due process problem surfaces because the class action judgment binds all members of a (b)(2) class. The Second Circuit in requiring notice relied solely on *Mullane* v. *Central Hanover & Trust Co.*, 339 U. S. 306 (1950), which concerned the judicial settlement of accounts by the trustee of a trust fund created under state banking law. The Court held that the State could not assert jurisdiction over the trust beneficiaries unless notice were mailed to all whose names and addresses were known, and notice by publication given to those beneficiaries who were unknown or contingent. *Mullane*, however, denied that individual notice was required in every action.

The Supreme Court plainly stated that it had not committed itself to any formula in achieving a balance between the interests of the State and the interests of the individual parties in the litigation or in "determining when constructive notice may be utilized or what test it must meet. Personal notice has not in all circumstances been regarded as indispensable to the process due to residents, and it has more often been held unnecessary as to nonresidents." *Id.* at 314. Because the Court linked the requirement of notice to the particular circumstances of each case, it is important to note that the situation in *Mullane* is significantly different from the situation in a (b)(2) class action. First, *Mullane* dealt with the established interests of individuals in specific property, a common trust fund. Second, the interests of all the beneficiaries in that fund were not identical; some were entitled to interest income, while others were concerned with capital growth. These interests were represented by different guardians, but the personal interests of the guardians functionally differed from the interests of the beneficiaries. Therefore, a significant possibility existed that they did not adequately represent the beneficiaries in the action.[37] Third, the benefi-

37. *See* Comment, *Adequate Representation, Notice and the New Class Action Rule; Effectuating Remedies Provided by the Securities Laws*, 116 U. Pa. L. Rev. 889, 912-13 (1968).

ciaries had a resident fiduciary as a caretaker of their interest in the trust "[b]ut it is their caretaker who in the accounting becomes their adversary." *Id.* at 316. Under these circumstances the possibility that parties having conflicting interests in specific property could be bound by an action of which they have no actual notice and brought by parties who possibly could represent those interests inadequately does violate due process. This possibility could not occur in a (b)(2) action.

The very nature of a (b)(2) class is that it is homogeneous without any conflicting interests between the members of the class. Since the class is cohesive, its members would be bound either by the collateral estoppel or the stare decisis effect of a suit brought by an individual plaintiff. Thus, as long as the representation is adequate and faithful, there is no unfairness in giving res judicata effect to a judgment against all members of the class even if they have not received notice. Adequacy of representation of the class is a mandatory requirement for the maintenance of a class action under Rule 23(a). If the representation proves inadequate, members of the class would not be bound. *Hansberry* v. *Lee,* 311 U. S. 32. 44-46 (1940). *Gonzales* v. *Cassidy,* 474 F. 2d 67 (5th Cir. 1973). Of course, there may be circumstances when the court, in its discretion, believes that notice to the absent members of the class is necessary for the fair conduct of the action. Rule 23(d)(2) anticipates such situations and permits the court to then require such notice. In most cases, however, "[n]otice would add little or nothing." Moore, *supra,* at 1152. We decline, therefore, to hold that due process ineluctably requires notice in all (b)(2) class actions.

We do not believe that *Mullane* overruled *sub silentio* the case of *Hansberry* v. *Lee, supra,* in which the Court was faced with the question of the res judicata effect to be given to a state class action. The Court wrote:

> It is a principle of general application . . . that one is not bound by a judgment *in personam* in a litigation in

which he is not designated as a party or to which he has not been made a party by service of process.

* * * * *

To these general rules there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a "class" or "representative" suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it.

* * * * *

[T]his Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it.

Id. at 40-42.

We believe that if there is truly adequate representation, the interests of absent parties to a (b)(2) class are protected. We thus agree with the framers of the rule,[38] several district courts that have expressly considered the question,[39] and several of the commentators[40] that notice to absent members of a (b)(2)

38. There is a strong impression that the rule is valid. *See* Hanna v. Plumer, 380 U. S. 460 (1965).

39. Northern Natural Gas Co. v. Grounds, 292 F. Supp. 619, 636 (D. Kan. 1968) ("the essential requisite of due process as to absent members of the class is not notice, but the adequacy of representation of their interests by named parties"); Dolgow v. Anderson, 43 F. R. D. 472 (S. D. N. Y. 1968) ("adequacy of representation, not form of notice, is the crucial consideration"). *See* Woodward v. Rogers, 344 F. Supp. 974, 980 (D. D. C. 1972) *aff'd*, 486 F. 2d 1317 (D. C. Cir. 1973) ("where the adequacy of the representation of the class interests by the named parties is clear, where no apparent purpose would be served by notice to this wide ranging class . . . and where, indeed, judgment is in favor of the class, the essential requisites of due process have been met without further notice.").

40. *Moore, supra* ¶ 23.35; Note, *Constitutional & Statutory Requirements of Notice Under Rule 23(c)(2)*, 10 B. C. Ind. & Comm. L. Rev. 571 (1969); Comment, *Adequate Representation, Notice and the New Class Action Rule; Effectuating Remedies Provided by the Securities Laws*, 116 U. Pa. L. Rev. 889 (1968).

class is not an absolute requisite of due process. For the foregoing reasons, we have concluded that there was no denial of due process in this case.

V

Almost anticlimactically, we turn to the question of whether the district court properly granted Wetzel's and Ross' motion for summary judgment. To fully consider this question, we must review the evidence in some detail.

The Company historically had employed claims adjusters but the position of claims representatives was not created until sometime in 1965. Of the 3,129 claims adjusters hired between July 1, 1965, and March 17, 1972, only two were women; they were hired after Wetzel and Ross filed their administrative charges. During that same period 2,329 persons were hired as claims representatives of which 2,302, or 98.84% were women. During each year between 1965-1969, an average of 1,441 adjusters worked for the Company; in none of those years were more than two adjusters women. In 1970, the number of women female adjusters increased to 5 or 0.31% of the 1,645 adjusters employed that year. In 1971, that percentage increased slightly to 2.8%.

It does not appear that women were any less qualified to become claims adjusters than men. When the Company decided to recruit women claims adjusters in 1971, it found that of its then existing claims representative force of 600 women, approximately ⅓ were considered qualified to become claims adjusters. Approximately 10% of the claims representatives were offered and accepted the claims adjusters' position.

This statistical evidence is buttressed by additional documentary evidence. The Company's recruitment brochure describes the position of claims representative as "Fit for a Queen." In contrast, the brochures entitled "A Management Career in Liberty Mutual's Claim Department," challenge the applicant with the inquiry, "Are you the right man?"

Liberty Mutual's training manual, copyright 1970, is replete with reference to pronouns of the female gender.[41]

The evidence with respect to the Company's promotion policy is just as impressive. Promotions available to female claims representatives were only to positions of supervising claims representative and claims representative supervisor. Claims adjusters, however, could be promoted to those positions and to numerous other positions which could not be achieved without first being an adjuster.

Between July 1, 1965, and January 18, 1973, the Company had not employed one woman as a branch office claims manager but had employed in the same position between 121 and 142 men annually. During the same period, no more than 9 or 1.65% of all persons employed on an annual basis as claims supervisors were women. Not one woman was promoted to claims supervisor from the ranks of claims representative between July 1965 until the end of 1969. Of the 97 persons promoted to claims supervisor in 1970, only one was a woman. Again in 1971, only one woman was promoted. This statistical

41. Typical are the following general instructions:

> This course consists of four text books and a Form Book, plus supplementary materials, designed to help you train your new Claims Representative. The first two text books covered A, AP & SA Claims—when your C: R. finishes Books 1 and 2 *she* will be able to process an automobile claim from first report to closing. Book 3 will equip *her* to handle L & S1 cases. Book 4 will teach *her* to handle X and SX cases. . . .
>
> * * * * *
>
> To get the most out of this training program, you should:
>
> * * * * *
>
> b. Supply the trainee with required materials before *she* starts to work through any volume . . . .
>
> * * * * *
>
> e. Ask the trainee to complete the chapter on which *she* is working before going to change of pace activity.
>
> * * * * *
>
> Use this program patiently. Let your C. R. take, within suggested limits, the time *she* needs to complete the course (emphasis supplied).

evidence is also corroborated by the Company's recruiting brochures. The brochures for claims representatives describe the only advancement opportunities as supervising claims representative and claims representative supervisor. The brochure for claims adjusters refers to the glowing advancement opportunities available to the claims adjuster.

Rule 56(c) provides that summary judgment shall be granted when there is no genuine issue of material fact and when the moving party is entitled to judgment as a matter of law.[42] Rule 56(c) provides that the adverse party must by affidavit set forth specific facts demonstrating the existence of a genuine issue for trial.[43]

We are aware of the admonition that "[i]n the area of employment, with its complexities and variables, statistics must be analyzed with careful attention both to supportive and opposing facts." *Pettway* v. *American Cast Iron Pipe Co.*, 494 F. 2d 211, 230-231 n. 44 (5th Cir. 1974). But we also recognize the oft cited rule that "statistics often tell much and courts listen." *Alabama* v. *United States*, 304 F. 2d 583, 586 (5th Cir.) *aff'd per curiam*, 371 U. S. 37 (1962). In fact, statistics are particularly appropriate in Title VII class actions where it is the aggre-

42. Rule 56(c) provides in pertinent part:

. . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and the admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law.

43. Rule 56(e) provides in pertinent part:

. . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits, or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If does not so respond, summary judgment, if appropriate, shall be be entered against him.

gate effect of a company's policy on the class which is important.[44]

Under *McDonnell-Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), once the plaintiff has established a prima facie case of discrimination, the burden shifts to the employer to provide non-discriminatory reasons to rebut the prima facie case. The statistics in this case establish the existence of a prima facie case of sex discrimination. The burden thereupon shifted to Liberty Mutual to establish that these statistics were misleading or to establish non-discriminatory reasons for its policies. Despite its assurances that "good and sufficient reasons for the existence of these statistics, together with a full explanation, will be offered in due course at the proper time," the district court found that Liberty Mutual's response to plaintiffs' motion "failed to address this burden at all, let alone rebut the Plaintiffs' evidence." The time for explanation has come and gone. We believe the evidence established as a matter of law the existence of sexual discrimination in violation of Title VII.

The Company also raises eight disputed issues of material facts which it claims the district court either declared immaterial or improperly resolved. We have carefully examined each and find no merit in any of them.

The judgment of the district court as to the maintenance of the class action will be affirmed. The part of its order which includes in the class past employees whose claims are time barred will be vacated. The district court's granting of summary judgment will be affirmed.

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44. Numerous courts have relied on evidence of numerical disparity among classes of employees to prove discrimination under Title VII. *See. e.g.*, Rowe v. General Motors Corp., 457 F. 2d 348 (5th Cir. 1972); United States v. Ironworkers Local 86, 443 F. 2d 544 (9th Cir.), *cert. denied*, 404 U. S. 984 (1971); Parham v. Southwestern Bell Telephone Co., 433 F. 2d 421 (8th Cir. 1970); Jones v. Lee Way Motor Freight, Inc., 431 F. 2d 245 (10th Cir. 1970), *cert. denied*, 401 U. S. 954 (1971). Although all of these cases were decided after full trial, we see no reason why statistical evidence is less appropriate at a hearing on a motion for summary judgment.

UNITED STATES COURT OF APPEALS

* * (Caption—74-1515) * *

Present: STALEY, ALDISERT and ROSENN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that that part of the order of the said District Court entered March 19, 1974 which relates to the maintenance of the class action be, and the same is hereby affirmed; that part of the said order which includes in the class past employees whose claims are time barred be, and the same is hereby vacated; that part of the order granting summary judgment be, and the same is hereby affirmed.

Attest:

M. ELIZABETH FERGUSON
Chief Deputy Clerk

January 23, 1974

UNITED STATES COURT OF APPEALS

• • (Caption—74-1515) • •

Present: STALEY, ALDISERT and ROSENN, *Circuit Judges*

AMENDED JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that that part of the order of the said District Court entered March 19, 1974 which relates to the maintenance of the class action be, and the same is hereby affirmed; that part of the said order which includes in the class past employees whose claims are time barred be, and the same is hereby vacated; that part of the order granting summary judgment be, and the same is hereby affirmed. Costs taxed against appellant.

Attest:

/s/ (Illegible)

Clerk

February 14, 1975

UNITED STATES DISTRICT COURT
W. D. Pennsylvania

SANDRA WETZEL and MARI ROSS on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

LIBERTY MUTUAL INSURANCE COMPANY, a corporation,

Defendant.

Civ. A. No. 72-169

Jan. 9, 1974

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* * * * *

OPINION

WEBER, *District Judge*

The two named Plaintiffs on behalf of themselves and all other female technical employees employed in Defendant Liberty Mutual Insurance Company's Claims Department (the Company) have filed a Complaint charging that the Company discriminated against women in hiring, job classification, promotions, and in the compensation and job benefits they received for the jobs they were allowed to hold.

The Representative Plaintiffs are Sandra Wetzel, a woman, who was hired by Defendant Company as a "Claims Representative" in July 1967, and Mari Ross, who was hired by Defendant Company as a "Claims Representative" in September 1967. Both allege that they suffered discrimination by reason of their

sex because of the hiring, job classification, pay differential, and employment benefit policies of Defendant Company and that these policies were applied to all female technical employees in the Defendant's Claims Department throughout the nation where Defendant Company did business.

The court determined that the action should proceed as a class action covering all female technical employees in the Defendant's Claims Department in the entire geographical area where the Company did business. The class as now defined includes all such employees who were hired or working for the Company in its Claims Department since July 2, 1965, the effective date of Title VII of 42 U. S. C. § 2000e et seq., the Equal Employment Opportunity Act of 1972.

Extensive discovery has been employed and the Plaintiffs now file a motion for partial summary judgment on certain of the issues raised. It is agreed between the parties that one of the issues, designated the "equal pay" issue, is not susceptible of summary judgment at this time because there are disputed issues of fact with respect to whether or not the work performed by women in the job classification of "Claims Representative" was equal to the work performed by men in the job classification of "Claims Adjuster" for which they were paid a substantially higher salary. However, the Plaintiffs at this time allege that there is no genuine issue as to any material fact with respect to the job classification under which men and women were originally hired as technical employees in the Claims Department, with regard to the promotional policy within the Claims Department, and with regard to the pregnancy and maternity leave policies of the Company including the disability income protection plan of the Company as applied to women on maternity leave.

The key point of discrimination set forth in the pleadings, evidentiary material and briefs of the plaintiffs, and the *amicus curiae* brief of the United States Equal Employment Opportunity

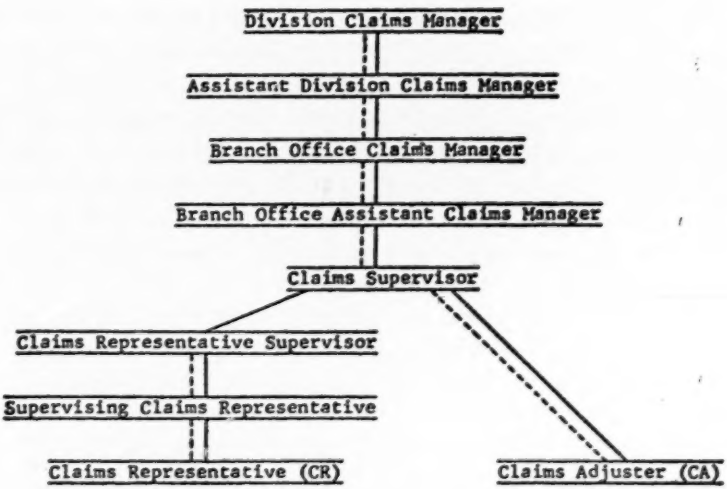
Commission is the hiring policy of the Company, since original assignment in effect determines the employee's future chances of promotion within the Company. Because the Company in its Claims Department promotes from its own ranks, the opportunity for advancement depends upon the entry level position to which an employee is assigned upon first being employed by the Company's claim division. Promotion to the higher rank of Claims Supervisor was limited to persons holding the position of Claims Adjuster and throughout most of the period under consideration through 1970 was limited to male employees because all Claims Adjusters were male. On the other hand the entry level classification in the Company's Claims Department of "Claims Representative" was exclusively limited to women throughout most of the period under consideration here. There was no avenue of promotion to Claims Supervisor and higher supervisory positions from those personnel classified as "Claims Representatives" on entry into the Company in its Claims Division.

There were two higher supervisory positions in the "Claims Representative" category, that of "Supervising Claims Representative" and "Claims Representative Supervisor", but no promotion beyond the second rank. Although the line of responsibility from "Claims Representative Supervisor" runs to "Claims Supervisor" there is no similar line of promotion because all "Claims Supervisors" are drawn from the ranks of "Claims Adjuster".

The lines of responsibility and promotion are illustrated as follows:

CLAIMS DEPARTMENT - TECHNICAL EMPLOYEES

LINES OF RESPONSIBILITY AND PROMOTION



lines of responsibility _____
lines of promotion - - - - - - - -

The same educational requirements were in 1965 and thereafter until 1970 with respect to the hiring of "Claims Adjusters" and "Claims Representatives", a college degree. No prior experience in the insurance business was required and in fact the Company did not hire persons who had worked for other insurance companies in its entry level positions in the Claims Department.

Although the Defendant Company had employed "Claims Adjusters" for a long period of time the position of "Claims Representative" was created in mid-1965. The position was created when the Company had decided to handle more of its claims work from inside its offices. A recruiting brochure for this position was prepared and circulated through college

placement offices and employment agencies. The qualification for the "Claims Representative" position included a college degree. The recruiting brochure is entirely female oriented. Its title page bears the caption and picture identifying the position as a job fit for a queen. It shows women in its illustrations of persons performing their duties in this capacity. Between July 1, 1965 and the end of 1966, 401 persons were hired for the positions of "Claims Representative", not one of which was male. Between July 1, 1965 and March 17, 1972, 2,329 persons were hired as "Claims Representatives" of which 2,302 or 98.84% were women. The first male "Claims Representative" was hired in 1969, four in 1970, and twenty in 1971. During the period from 1965 until the end of 1970, the Company hired over 2,000 "Claims Adjusters", not one of which was female.

The recruiting brochure used by the Company during this period describing the position and duties of "Claims Adjusters" was entirely male oriented, its illustrations showing men performing the duties of the position, and bearing the legend in large type, "Are you the right man?", and reciting the avenues of advancement from Claims Adjuster through Branch Office Claims Manager, Division Claims Manager, Manager Home Office Examiners' Division, and so on up the ladder. The Company promoted to advanced positions in its Claims Department solely from those persons who had served it in the capacity of "Claims Adjuster".

The two Representative Plaintiffs were hired in the position of "Claims Representative" and they have deposed that in answer to their inquiries they were informed that the position of "Claims Adjuster", the beginning of the promotional ladder in the Claims Department, was not available for women. It has been admitted by representatives of the Defendant that the two named Representative Plaintiffs were qualified for the position of "Claims Adjuster" at the time of the original hiring.

It would serve little purpose to recite in detail the great mass of statistical evidence which the Plaintiffs have produced in support of their contention that the two initial entry positions were segregated between male and female applicants, that the educational requirement for both positions was the same, that no prior insurance experience was required for either position, that the functions performed in these positions were very similar that the pay differential between the positions was substantial, being approximately $2,500 per year greater for the Claims Adjuster, that prior to 1971 no opportunity was given to women "Claims Representatives" to qualify for the position of "Claims Adjuster", and that all promotions to higher positions in the Claims Department were made from the ranks of the exclusively male "Claims Adjuster" classification.

In addition to the statistical evidence which is unrebutted here the Plaintiffs have produced additional supporting evidence of the Company's employment policies with respect to women in the Claims Division. Much of this evidence is in the form of oral testimony and affidavits which may be subject to a question of credibility but a good deal of the supporting evidence is documentary and supports the Plaintiffs' contention of a recognized pattern of treating the male and female employees in the Claims Department differently in respect to recruitment, hiring classifications, promotional opportunities, and salary.

We are not speaking of salary or compensation with respect to the question of whether equal pay was given for the same work but in connection with the entry level salary paid for the two classifications and the salary differential between "Claims Representatives" of considerable experience and the starting salary which they could receive when openings were finally made available to "Claims Representatives" to become "Claims Adjusters".

Two sections of Fed. R. Civ. P. 56 are applicable to our consideration of Plaintiffs' motion for summary judgment. Fed. R. Civ. P. 56(c) provides in part:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and [the] admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law."

and Fed. R. Civ. P. 56(e) which provides in part:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits, or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

The Plaintiffs have relied chiefly on statistical evidence in support of their contention of discriminatory employment policies and in many cases the courts have accepted such evidence in determination of whether Title VII has been violated. Parham v. Southwestern Bell Telephone Co., 433 F. 2d 421 [8th Cir. 1970]; Witherspoon v. Mercury Freight Lines, Inc., 457 F. 2d 496 [5th Cir. 1972]; Bing v. Roadway Express, Inc., 444 F. 2d 687 [5th Cir. 1971]; Rowe v. General Motors Corp., 457 F. 2d 348 [5th Cir. 1972]. In accordance with these decisions and under the doctrine of McDonnell Douglas Corp. v. Green, 411 U. S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 [1973], once the plaintiff has established a prima facie case by setting forth statistics of this kind the burden is on the employer to sufficiently explain the disparity in hiring; conclusory statements that the employer never discriminated in hiring is insufficient to satisfy this burden. As stated in *McDonnell*, supra, "The burden then must shift to the employer to articulate some legitimate, non-discriminatory reason for the respondent's rejection." (p. 802, 93 S. Ct. p. 1824). We are of the opinion that the Defendant's response to the Plaintiffs' motion for summary judgment fails to address this burden at all, let alone rebut the Plaintiffs' evidence.

The response of the Defendant raises eight issues of defense, as follows:

1.

Neither of the named Representative Plaintiffs is currently in the employ of the Defendant. This is not a contested issue of fact. The Plaintiffs admit that both the representative party Plaintiffs have left the employ of Defendant and the question of whether or not their termination from employment was voluntary or forced by discriminatory employment practices of the Defendant is not an issue before us at this time. This is a matter of law concerning standing and it has been held that a former employee may bring an action to enforce rights under this statute claimed to have been infringed. In Hackett v. McGuire Bros., Inc., 445 F. 2d 442 [3d Cir. 1971] this contention was rejected;

> "The national public policy reflected . . . in Title VII . . . may not be frustrated by the development of overly technical judicial doctrines of standing or election of remedies. If the plaintiff is sufficiently aggrieved so that he claims enough injury in fact to present a genuine case or controversy in the Article III sense, then he should have standing to sue in his own right and as a class representative." (pp. 446, 447).

The Circuit Court continued:

> "A person claiming to be aggrieved may never have been an employee of the defendant. Indeed the Act forbids discrimination not only by employers, 42 U. S. C. § 2000e-2(a)(2), but also by potential employers, 42 U. S. C. § 2000e-2(a)(1), by labor organizations, 42 U. S. C. § 2000e-2(c), and by employment agencies, 42 U. S. C. § 2000e-2(b). An aggrieved person obviously is any person aggrieved by any of the forbidden practices. (pp. 445-446).

An interesting commentary on the argument asserted to this court was made in Reed v. Arlington Hotel Co., Inc., 476 F. 2d 721 [8th Cir. 1973]:

". . . if this kind of an individual [a discharged employee, not seeking reinstatement] would be prevented from bringing class actions as the rules permit, there would be a windfall for the employer, and when any such matter was coming up, all they would have to do is discharge the employee . . ." (p. 723).

2.

The Defendant argues that the representative party Plaintiffs were offered "Claims Adjuster" status and has filed evidence to this effect. This is not denied by Plaintiffs but they contend that the terms of the offer were unacceptable and were made after the charges of discrimination were filed in this case with the United States Equal Employment Opportunity Commission in 1971. We find this to be a disputed issue of fact which may be relevant to the question of damages of the representative party Plaintiffs, but irrelevant to the question of violation of the statute which is before us. Under all circumstances, it is shown by the evidence that the offer of "Claims Adjuster" status was made long after the effective date of the statute in question, after both representative Plaintiffs had been employed in the positions of "Claims Representatives" for several years, and after the filing of the Complaints before the EEOC in this matter.

3.

Defendant claims that there is a dispute as to the content of conversations between representatives of the Company and a representative of the Pennsylvania Human Relations Commission. This alleged conversation bears on the Company's motive and intent in offering "Claims Adjuster" status to the named-Plaintiffs at the time that it did. We find this completely immaterial to the issue before us at this time because the offer of Claims Adjuster status was not made until the alleged discriminatory practices in violation of Title VII of the Act had continued for several years and the issue had been raised

by a Complaint to the Equal Employment Opportunity Commission by the named Plaintiffs.

4.

The Defendant contends that there is a disputed issue of fact on the question of whether or not the qualifications and entrance requirements for the position of "Claims Adjuster" are substantially different from those of "Claims Representative". Although with respect to the duties and responsibilities of each position which we have previously designated as the "equal pay" issue, not before the Court on this Summary Judgment motion, nevertheless we are concerned at this time with whether or not qualified female applicants were excluded from the position of "Claims Adjuster" and its subsequent promotional ladder. The statistical evidence shows that of more than 2,000 persons hired for the position of "Claims Adjuster" up through 1970, not one was female. The Defendant's own representatives have admitted that the representative Plaintiffs in this case were qualified for the position of "Claims Adjuster" at the time of original hiring. Therefore, we find that the Defendant has not met the burden of showing why no female personnel were hired for the "Claims Adjuster" position during the period following the effective date of Title VII until sometime after August 1971 and subsequent to the filing of complaints in the within matter. Plaintiff's contention is further supported by evidence that no female employees occupied the supervisory position of "Claims Supervisor" in the Company which were filled from the ranks of the "Claim Adjusters" until at least 1970. If the jobs were substantially dissimilar as the Defendant claims, the differential in starting salary may be justified but the total exclusion of women from entry into the higher paid "Claims Adjuster" position would remain as a discriminatory practice, and the promotional policy of the company in drawing all of its supervisory personnel from the ranks of the exclusively male "Claims Adjusters" continued

and emphasized the discriminatory effect of the policy. Therefore, we find that the Defendant's argument of a difference in the qualifications or duties of the two positions is immaterial to the Plaintiffs' charge that women were discriminated against in the selection of persons to fill the "Claim Adjuster" position. The company has offered no evidence of any bonafide occupational qualification to justify the complete exclusion of women for this position for over a period of five years, particularly in view of its later determination that some women "Claims Representatives" were qualified for and were offered these positions.

5.

The Defendant argues that it is not clearly established by the evidence that a large number of Defendant's female employees were desirous of and qualified for better positions. We cannot see the materiality of this argument to the question presently before us. The undisputed evidence establishes that after charges were filed in this case, the Defendant did interview its "Claims Representatives" and that 10% of them were offered and accepted positions as "Claims Adjusters". It was further established by testimony of a Company representative that the Company considered one-third of its women "Claims Representatives" to be qualified for the position of "Claims Adjuster". We fail to see how these facts alter the statistical evidence that of the more than 2,000 "Claims Adjusters" hired between 1965 and 1970 none were women, that all of the "Claims Representatives" hired during this period were women, that no woman in the job classification of "Claims Representative" was ever promoted to the supervisory position of "Claims Supervisor" during this period; that the Company deliberately engaged in the recruitment of women for the "Claims Representative" position and represented the "Claims Adjuster" position to be solely a position for male applicants.

6.

The Defendant objects to using the import of the recruiting brochures which were offered in evidence by Plaintiffs and has shown that they have since been superseded by new recruiting literature that is not sex oriented. However, in this matter as in several other matters offered in defense in this case the evidence shows that the Company policy changed after having been continued for a period of approximately five years from the effective date of Title VII and after the threat of the instant litigation became imminent. While the change in Company policy may affect the question of the amount of damages for which it may be liable, we cannot see what effect it has on the liability of Defendant for its policy from and after July 2, 1965.

7.

The Defendant disputes the Plaintiffs' statement that Defendant discouraged acceptances for the offer given to female "Claims Representatives" for re-classification to the position of "Claims Adjuster". We do not find this to be a dispute on a material issue of fact. Whether or not the company discouraged its female "Claims Representatives" from accepting the offered position of "Claims Adjuster", after that occupational classification was opened to women is immaterial to the issue of whether or not the Company practiced discrimination in its employment policies from and after July 2, 1965.

For the purposes of this motion we may assume that the Company did not discourage its female employees from accepting offers to transfer to the classification of "Claims Adjuster."

8.

The Defendant disputes the inferences which the Plaintiffs draw from the facts that no women were promoted to the positions of Branch Office Claims Manager and above. Whether

or not there is a dispute from these inferences the undisputed fact remains that no women in the Defendant's organization were promoted to or held these positions, and the Defendant has failed to come forward with any evidence to explain or refute the disparity in promotional practices.

II.

A second issue presented by Plaintiffs' motion for summary judgment may be broadly categorized as the maternity leave issue. This in turn is divided into two sub-issues which we label as

(a) the maternity leave conditions of employment and
(b) the income protection plan as applied to maternity leave.

(a) *Maternity leave policy.*

Until March 1967, the Company policy was to terminate the employment of a pregnant employee at the end of her sixth month of pregnancy. Thereafter, until September 1970 the policy was to terminate an employee after the eighth month of pregnancy. An employee so terminated could be re-employed, at the sole discretion of the Company, if she re-applied for employment after the birth of her child and if there was a position, available.

In September 1970, Company policy was changed to require pregnant employees either to terminate employment or to take a leave of absence at the end of the eighth month and to return to work either within six months of the date of termination of employment or three months from date of delivery, whichever comes first.

In November 1971, Company policy was again changed to permit an employee to work for as long as her physician certifies her ability to work prior to commencing a maternity leave of absence.

(a) *Income Protection Policy.*

The Company provides as a fringe benefit of employment an Income Protection Plan which provides for the payment of income during periods of disability. This plan is funded by insurance benefits. The only long term disability for which no benefits are provided is pregnancy. Furthermore, the Defendant's health insurance plan provides coverage for children of employees who are working for the Company at the time of the birth of the child, and this excludes from coverage the child of an employee who is absent on a maternity leave of absence at the time of the birth of the child.

There is no disputed issue of fact as to the provisions of the maternity leave policies and the fringe benefit coverage of Defendant Company. The question presented to us is solely a matter of law as the application of Title VII to these undisputed facts.

A threshold question raised by Defendant is that the Plaintiffs have not fulfilled the statutory requirement of exhaustion of the administrative remedy, 42 U. S. C. § 2000e-5(e) because the charges filed by these Plaintiffs with the EEOC never mentioned this aspect of the complaint. The policy of the statute is to give the EEOC an opportunity to investigate and conciliate charges of discrimination.

The strongest case urged by Defendant Company is Tedford v. Airco Reduction Co., 4 F.E.P. Cases 406 [5th Cir. 1972], where the Court of Appeals reversed the dismissal by the District Court of a claim for discriminatory hiring practices because of mootness. The Appeals Court held that the subsequent hiring of plaintiff did not extinguish plaintiff's claim for back wages. However, the Court of Appeals did sustain the dismissal of claims of a discriminatory seniority system and discriminatory job assignments because,

> "the only factual allegation in Tedford's EEOC complaint was that Airco had refused to hire him as a truck driver because of his race."
>
> * * * * *
>
> "But giving this factual allegation the most generous construction possible, we still are unable to conclude that the investigation could properly have extended to Airco's seniority system, the driver lists, and the like. A charge filed before the EEOC is not a plenary charter for a Commission investigation of every aspect of a company's employment practices. The conclusion is unavoidable that the EEOC has never been called upon to investigate these practices, and accordingly that litigation of their validity in federal court is premature." 4 F.E.P. Cases, p. 409.

However, this was the same Circuit Court that decided Sanchez v. Standard Brands, 431 F. 2d 455 [5th Cir. 1970], and the *Tedford* court gave due regard to the *Sanchez* doctrine.

However, the courts have not restricted a plaintiff's suit under 42 U. S. C. § 2000e-5(e) to the specific issues raised before the EEOC, nor to the specific findings of the EEOC.

> "Respondent satisfied the jurisdictional prerequisites to a federal action (i) by filing timely charges of employment discrimination with the Commission and (ii) by receiving and acting upon the Commission's statutory notice of the right to sue, 42 U. S. C. §§ 2000e-5(a) and 2000e-5(e). The Act does not restrict a complainant's right to sue to those charges as to which the Commission has made findings of reasonable cause, and we will not engraft on the statute a requirement which may inhibit the review of claims of employment discrimination in the federal courts. . . . and the courts of appeal have held that, in view of the large volume of complaints before the Commission and the nonadversary character of many of its proceedings 'court actions under Title VII are de novo proceedings and . . . a Commission "no reasonable cause" finding does not bar a lawsuit in the case.' Robinson v. Lorillard Corp., 444 F. 2d 791, 800 [C.A. 4, 1971]; Beverly v. Lone Star Lead Construction Corp., 437 F. 2d 1136 [C.A. 5,

> 1971]; Flowers v. Local 6, Laborers International Union of North America, 431 F. 2d 205 [C.A. 7, 1971]; Fekete v. United States Steel Corp., 424 F. 2d 331 [C.A. 3, 1970]." McDonnell Douglas Corp. v. Green, 411 U. S. 792, 798-799, 93 S. Ct. 1817, 1822, 1823, 36 L. Ed. 2d 668 [1973].

In Sanchez v. Standard Brands, Inc., cit. supra, it was explained that in filing a charge with the EEOC an aggrieved person is supplied with a simple one-page charge form in which a row of boxes is provided to check the category of discrimination. We have as Exhibits in the present case the Notice of Charge which the EEOC gave to Defendant Company for each case which indicates "Basis of Discrimination—Sex", and "Nature of Charge—Promotion—Terms and Conditions." The *Sanchez* court found that no charging party should be barred from the assertion of a charge because of the technicality of his description.

> "Surely the only procedural requirement which should confront a Title VII complainant is the requirement that he state, within the ninety-day period, *facts* sufficient to trigger a Commission investigation. 431 F. 2d p. 462.

Sanchez continues:

> "At least one district court in this circuit has addressed itself to the question, however, and in our judgment it responded to the question by giving the correct answer. In King v. Georgia Power Co., N. D. Ga. 1968, 295 F. Supp. 943, Judge Smith held that the allegations in a judicial complaint filed pursuant to Title VII 'may encompass any kind of discrimination like or related to allegations contained in the charge and growing out of such allegation during the pendency of the case before the Commission.' 295 F. Supp. at 947. In other words, the 'scope' of the judicial complaint is limited to the 'scope' of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." 431 F. 2d p. 466.

It appeared from oral argument that Defendant, although it had received the "Notice of Charge of Employment Discrimination", had not seen copies of the original charges filed by Plaintiffs with the Commission before the argument. It appeared that they had never been requested. They were supplied to the court and counsel the day following the argument on this motion. The charge of Plaintiff Mari Ross states, inter alia, "During interview for position as claims representative was subjected to questions regarding marital situation and birth control." Furthermore, the Plaintiffs were required to pursue their charges through an appropriate state agency, the Pennsylvania Human Relations Commission, which on July 1, 1971, sent to Defendant a Complaint which recited, inter alia:

> "The complainants further allege that female applicants, as a condition of hire, are subjected to inquiries about anticipated marriage and family size, while men are not similarly evaluated as a condition of hire."
> (*Aune, Deposition, Exhibition 1*).

The court believes that the Representative Plaintiffs have properly employed the administrative procedures of Title VII which are a prerequisite to suit in the district court, they have properly raised the issue of sex discrimination in the "terms and conditions" of employment, that they specifically raised allegations of discrimination in respect to marital status and family planning sufficient to satisfy the administrative investigation requirement for raising the specific question of sex discrimination in maternity leave and pregnancy disability income policies in the present lawsuit.

As a point of departure in considering the merits of Plaintiffs' charges of sex discrimination with respect to Defendant's maternity leave and pregnancy disability income protection policies it might appear to the lay mind that we are treading on the brink of a precipice of absurdity. Perhaps the admonition of Professor Thomas Reed Powell to his law students is apt; "If you can think of something which is inextricably related to some

other thing and not think of the other thing, you have a legal mind."

We are dealing with a statute enacted by the Congress of the United States which says:

> "It shall be unlawful employment practices for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's . . . sex; or
>
> (2) to limit, segregate or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex." 42 U. S. C. § 2000e—2(a).

The defendant argues that its policies with regard to maternity leave and income protection for disability excluding pregnancy are not sex discriminatory because pregnancy is "sui generis" and thus subject to special treatment.

We believe that the court may take judicial notice of certain well known facts and statistics to illustrate the problem. We have taken our statistics from the United States Census figures as published in the 1974 edition of the World Almanac. In 1970, according to the census figures, there were 105,000,000 women and 100,000,000 men in the United States. In 1972 there were 31,000,000 women and 51,000,000 men, sixteen years of age and upwards, employed in the United States. Women between the ages of fourteen through forty-four amounted to 43.5% of the total female population or 45,675,000 women, which we equate with the childbearing age. There is a necessary overlapping of the 31,000,000 women in the work force sixteen years of age and older, and the 45,000,000 women in the childbearing ages of fourteen to forty-four. There were 3,191,000 live births in the United States in the year ending

June 30, 1973 which produces a birth rate of about fifteen per 1,000 of total population, but a fertility rate of sixty-nine births per 1,000 women fifteen to forty-four years of age. We recognize that more precise statistics are available but we are not concerned with minutiae and only recite these figures to illustrate the scope of the problem. Pregnancy is a natural condition, it is an expectable condition, it is a statistically foreseeable condition, and ultimately it is a necessary condition. It is a condition limited to women, not by statutory law or custom, but by biological law. If three-eighths of our employee working force consists of women, and their age group necessarily overlaps in large measure the childbearing age group, pregnancy is certain to occur in a statistically expectable number of employees. We have no doubt that a large insurance company is well aware of the precise statistics. We further note from this case that the defendant's recruiting policies for female technical employees in its claims department was aimed at young women finishing their college education, and that its promotional policy was to advance personnel within its own ranks and not draw upon outside sources. This policy would only increase the incidence of young women of childbearing age among the female employees of a growing business organization such as Defendant, which hired over 2,000 new female claims representatives in a five year period.

Because pregnancy is a natural, expectable, and societally necessary condition, which is certain to occur in a statistically predictable number of women in the labor force, we see no merit in Defendant's argument that it may be excluded from equality of treatment in conditions and benefits of employment because it is a voluntary condition. Whether voluntary or not, it occurs with certainty and regularity. The distinction drawn between one hiring policy for men and another for women—each having pre-school age children—was rejected by the Supreme Court in Phillips v. Martin Marietta Corp., 400 U. S. 542, 544, 90 S. Ct. 496, 27 L. Ed. 2d 613 [1971] where there was no showing that the condition in question is a bona-

fide occupational qualification necessary to the operation of that particular business or enterprise.

The United States Equal Employment Opportunity Commission which is the administrative body created by Title VII to administer the Act, has issued the following Guidelines with respect to the question at issue:

> § 1604.10 Employment policies relating to pregnancy and childbirth.
>
> (a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in *prima facie* violation of Title VII.
>
> (b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery, therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, and accrual of seniority and other benefits or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.
>
> (c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employee of one sex and is not justified by business necessity.
>
> 29 C. F. R. Labor, Chapter XIV, Part 1604, As Amended (As of March 31, 1972).
>
> § 1604.9 Fringe benefits.
>
> (a) "Fringe benefits," as used herein, includes medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.

(b) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits.

29 C. F. R. *idem.*

We give full recognition to the principle urged upon us that the EEOC Guidelines, 29 C. F. R. § 1604.10, effective April 5, 1972, do not have the force of law in the sense that the "regulations" or "substantive rules" of an administrative body authorized by statute to promulgate regulations to implement existing law have a binding effect. We also recognize that the Guidelines are interpretive statements of what the administrative officer thinks the regulations mean. Gibson Wine Co. Inc. v. Snyder, 90 U. S. App. D. C. 135, 194 F. 2d 329 [1951]. We are not compelled to follow them, but some deference is due. Espinoza v. Farah Manufacturing Co., 462 F. 2d 1331, 1335 [6th Cir. 1972].

Our own Court of Appeals states it more strongly:

> "Such an administrative interpretation is entitled to great deference. Griggs v. Duke Power Co., 401 U.S. 424, 433-434, 91 S. Ct. 849, 28 L. Ed. 2d 158 [1971]; Udall v. Tallman, 380 U.S. 1, 85 S. Ct. 792, 13 L. Ed. 2d 616 [1965]. That the guideline was not promulgated until after this suit was initiated is of no moment. Rights which came into being when the Act was passed are not abrogated by administrative interpretation. Bartmess v. Drewrys U. S. A., Inc., 444 F. 2d 1186 [C.A. 7], cert. denied, 404 U. S. 939, 92 S. Ct. 274, 30 L. Ed. 2d 252 [1971]."
>
> "A reading of the statute convinces us that the commission's interpretation furthers the legislative purpose of the Act and is consistent with the plain meaning of the language employed.
>
> 'Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.' Sprogis v. United Air Lines, 444 F. 2d 1194, 1198 [C.A. 7], cert. denied, 404 U.S. 991, 92 S. Ct. 536, 30 L. Ed. 2d 543 [1971]." Rosen v. Public Service Electric and Gas Co., 477 F. 2d 90 [3rd Cir. 1973], at pp. 94-95.

The only current provision of the Defendant's maternity leave policy under attack is the provision that the employee who is granted a leave of absence for maternity must return to work on a date certain or be terminated from employment. Plaintiffs' Complaint is zeroed in on the target that this limitation on leave of absence for temporary disability is only applied to maternity cases. There is no such requirement for any other disability.

Because state and local governments were exempted under Title VII until 1972, there are few Title VII cases involving pregnancy that give us guidelines, but the question has arisen frequently under cases presenting claims of denial of equal protection or denial of civil rights under color of state authority. We believe that Title VII standards are more compelling on a private employer in view of the express statutory mandate upon employers and the absence of the question of a "rational basis" for classification by which a state statute is measured. Dandridge v. Williams, 397 U. S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 [1970]. While a fixed state policy of classification may survive an equal protection attack it may still be violative of Title VII. See Schattman v. Texas Employment Commission, 459 F. 2d 32 [5th Cir. 1972], and Newmon v. Delta Airlines, Inc., 475 F. 2d 768 [5th Cir. 1973].

A district court in the Fifth Circuit has recognized that:

> "*Schattman*, . . . turned upon a divided Appellate Court's interpretation of the federal statute as it then read on the question of its exclusion from coverage of state employers and employees." Vick v. Texas Employment Commission, 6 EPD 5990 [S. D. Tex. Aug. 30, 1973].

However, the *Vick* case found this impediment to jurisdiction removed by the 1972 Amendment to Title VII, and proceeded to find that the state's denial of unemployment benefits on the grounds that the last trimester of pregnancy rendered a woman unavailable for work, violated the provisions of Title VII.

> "While the expectancy of life confined and incident to female pregnancy involves many delicacies of personal, institutional and societal interest, Roe v. Wade, 410 U. S. 113 [93 S. Ct. 705, 35 L. Ed. 2d 147] 41 L. W. 4231 (January 22, 1973), such a natural and necessary female condition cannot be a basis for categorical discrimination in light of Phillips and its plain interpretation of Title VII of the Act." *Vick*, cit supra, 5 EPD p. 5992.

Nevertheless, we can take some guidelines from the Equal Protection Clause cases dealing with pregnancy.

Judge Brown in his dissent in Phillips v. Martin Marietta Corp., 416 F. 2d 1257 [5th Cir. 1969], vacated *per curiam* 400 U. S. 542, 91 S. Ct. 496, 27 L. Ed. 2d 613 [1972] noted with respect to that case, where women with pre-school age children were denied employment, but not men:

> "The distinguishing factor seems to be motherhood versus fatherhood. The question then arises: Is this sex-related? To the simple query the answer is just as simple: Nobody —and this includes Judges, Solomonic or life tenured— has yet seen a male mother. A mother, to oversimplify the simplest biology, must then be a woman". 416 F. 2d p. 1259.

To the argument that pregnancy is a voluntary status, the court in Buckley v. Coyle Public School System, 476 F. 2d 92 [10th Cir. 1973] says:

> "The fact, if it be a fact, that pregnancy is a voluntary status really has nothing to do with the question. The point is that the regulation penalizes the feminine school teacher for being a woman and, therefore, it must be condemned on that ground." 476 F. 2d at p. 95.

The Court of Appeals reversed the District Court's dismissal and remanded the case to the District Court for determination of a compelling state interest to justify the regulation.

In Green v. Waterford Board of Education, 473 F. 2d 629 [2nd Cir. 1973], the Court of Appeals reversed a District Court's dismissal of a complaint alleging that an inflexible maternity

leave policy denied equal protection. Even though the District Court had found a rational basis for the school board's action, the Court of Appeals found that the state's interests were not sufficiently promoted by rule to justify the arbitrary and inflexible regulation applied to pregnancy as distinguished from other disabilities.

> "The heart of plaintiff's case is that disqualifying a physically capable woman from working because of a condition related solely to her sex is unconstitutionally discriminatory. Plaintiff admits the obvious, that men do not become pregnant, but points out that men, being human, are also subject to crises of the body, some of which, like childbirth, give ample warning: A cataract operation or a prostatectomy, for example, may be planned months ahead. Because male teachers are not forced by defendant Board to take premature leave because of a known forthcoming medical problem, female teachers should not be treated differently. Thus stated, the argument is persuasive, even compelling. One realizes with a shock what so many women now proclaim: Old accepted rules and customs often discriminate against women in ways that have long been taken for granted or have gone unnoticed." (p. 634).

See also the following Equal Protection clause cases involving maternity leave: LaFleur v. Cleveland Board of Education, 465 F. 2d 1184 [6th Cir. 1972], cert. granted 411 U. S. 947, 93 S. Ct. 1921, 36 L. Ed. 2d 408, but Cf. Cohen v. Chesterfield County School Board, 474 F. 2d 395 [4th Cir. 1973], cert. granted, 411 U. S. 947, 93 S. Ct. 1925, 36 L. Ed. 2d 408.

Defendant has interposed a defense of good faith reliance upon an administrative interpretation, particularly in its defense on the income protection exclusion policy here. This may be a matter to consider when the questions of affirmative relief or back pay are determined but we cannot see its application to the immediate question of the inflexible maternity leave standard. During the period prior to the Guidelines published in March 1972, there were no guidelines or opinions issued by the EEOC. 42 U. S. C. § 2000e-12(b) (Sec. 713(b) of the Act)

provides that "no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or commission complained of was in good faith, in conformity with and in reliance upon any written interpretation or opinion of the Commission."

We do not believe that the various opinion letters referred to in the brief of *amicus curiae* United States Chamber of Commerce, with respect to the inclusion of maternity benefits in an insurance plan meet the requirements of Sec. 713; there is no evidence that defendant relied upon them, they were not addressed to the defendant, and do not otherwise conform to the requirements of a written opinion under which the defense of reliance may be asserted. Local 189 United Papermakers and Paperworkers, etc. v. United States, 416 F. 2d 980 [5th Cir. 1969]; Sprogis v. United Air Lines, Inc., 444 F. 2d 1194 [7th Cir. 1971].

The maternity leave policy of the company which since 1970 has granted a leave of absence for six months from the last date of work before delivery, or for three months from date of delivery, whichever comes first, has no relation to the fitness of any individual female to perform the functions of her job.

The defendant has not alleged, nor has it offered any evidentiary material to establish that there is a disputed issue of fact dependent upon a bona fide occupational qualification. Such a bona fide occupational qualification is a defense to a charge of discrimination where sex is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. This has been narrowly construed by the courts. In Weeks v. Southern Bell Telephone and Telegraph Company, 408 F. 2d 228 [5th Cir. 1969] the Court held this must give the employer "a factual basis for believing that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." In Rosenfeld v. Southern Pacific Co., 444 F. 2d 1219 [9th

Cir. 1971] the court held the exclusion of women justified only when "the sexual characteristics of the employee are crucial to the successful performance of the job, as they would be for the position of a wet-nurse." Under *Rosenfeld,* if one woman can do the job the employer cannot impose a blanket rule denying all women the opportunity.

Under the company policy any female who cannot return to her job within three months of delivery of her child is automatically terminated. No other disability is cause for such automatic termination. "For a woman, however, the effects of pregnancy and pregnancy-related illness are debilitating in much the same way as the physical and mental conditions that are included within the scope of the disability insurance program." Aiello v. Hansen, 359 F. Supp. 792 [N. D. Cal. 1973].

We conclude, as a matter of law, that the maternity leave policy in effect in Defendant Company at the present time and since September 1970 in the respect in which it requires a female to return to work within three months of the date of delivery of her child, or six months from the beginning of her maternity leave, whichever date is earlier, or face termination of employment, is violative of Sec. 703, of Title VII of the Civil Rights Act of 1964, as amended, in that such policy discriminates against female employees on the basis of sex.

Because only this present policy is still in existence, injunctive relief as to this practice is appropriate at this time.

We further find that all prior company policies in effect since July 2, 1965, which compelled pregnant female employees to leave employment at a fixed period of pregnancy before delivery were likewise violative of the Act, and the company policy in effect since July 2, 1965 which denied reemployment because of pregnancy and maternity were violative of the Act. Because these practices have ended there is no need for injunctive relief, and the question of the intentional nature of the violation and the appropriate relief will be considered in a subsequent stage of these proceedings.

Some additional considerations must be weighed with respect to plaintiffs' claim that the Income Protection Plan of Defendant company is discriminatory to female employees. The Company provides its employees with a contributory insurance plan for continuation of income for a "long term illness", i.e. an illness requiring treatment by a doctor of eight or more calendar days which causes absence from work. Such "benefits are not payable for disability due to occupational injury or to sickness covered under Workmen's Compensation Insurance; for disability due to pregnancy; for a disability in excess of 104 weeks; or for a disability during which you were not treated by a physician licensed to practice medicine."

Pregnancy is the only disability, not within the other exceptions, not covered by the Income Protection Plan. Pregnancy is a condition limited to women. Conditions limited to men, such as prostate troubles, are not excluded, nor is any exclusion provided for a number of illnesses whose incidence among males is greatly predominant (i.e. gout 19 to 1; the Merck Manual, 10th ed. 1961).

The brief of the United States Chamber of Commerce as amicus curiae cites cost of the program if pregnancy were included, as a justification for exclusion.

We must emphasize the distinction made by the Guidelines, § 1604.10(b) that it is "disabilities caused or contributed by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom" which for job-related purposes are to be treated as temporary disabilities. They do not cover leave for child rearing, but only for job disability. No evidence has been presented to us by Defendant as to the average duration of pregnancy disability. Again, we have a difficult time in freeing ourselves from stereotype thinking. We note that the Defendant's policy for maternity leave prior to delivery has accommodated itself from a fixed number of months prior to delivery to the recognition that an employee may work prior to delivery as long as she is able to do the job. Return to work may be made as soon after

delivery as she is able to do the job. We may assume from a general knowledge of the conditions of life, that in the normal or usual pregnancy, the period of disability will be relatively short. There is nothing in this record to show, and nothing in our general experience with life indicates that the job-related incidence of disability for pregnancy is any greater or any less than that for a prostatectomy.

The EEOC Guidelines provide, § 1604.9 Fringe Benefits, (e):

> "It shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other."

While cost may be a business purpose, and certainly to add pregnancy disability to the insurance program will cost more, it can only be a defense in a Title VII action where

> ". . . there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact, the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact. (footnotes omitted.) Robinson v. Lorillard Corporation, 444 F. 2d 791, 798 [4th Cir. 1971].

With respect to the argument of increased costs there is no statutory requirement that Defendant company offer any particular disability benefits, in any specific amount, or of any particular duration. The only requirement is that there be no inequality based on sex. Adjustments in the benefit plan to achieve equality are a recognized means of achieving that end. Rosen v. Public Service Electric Co. cit supra (p. 95); Hays v. Potlatch Forests, Inc., 465 F. 2d 1081 [8th Cir. 1972].

> "The increased costs could be accommodated quite easily by making reasonable changes in the contribution rate, the maximum benefits allowable, and the other variables affect-

> ing the solvency of the program." Aiello v. Hansen, 359 F. Supp. 792, at p. 798 [N. D. Cal. 1973].

A final requirement for a finding of violation of Title VII is that the court must find that defendant "has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint" in order to issue an injunction or to order such affirmative action as may be appropriate. While we are not now concerned with any question of relief in which the questions of back pay or reinstatement may be considered, certain continuing policies of defendant are subject to immediate injunctive relief, and require a finding of intentional action. Defendant has raised no question of intentional violation, except as to its defense of good faith reliance on administrative interpretation which we have found insufficient. The term "intentional" in this Act means that the Defendant intended to do what it did, not that there was a wilful and deliberate intention to violate the law.

> ". . . intentional unfair employment practices are those engaged in deliberately and not accidentally. No willfulness on the part of the employer need be shown to establish a violation of Sec. 706(g)." Kober v. Westinghouse Electric Corp., 408 F. 2d 240, 246 [3rd Cir. 1973].

We, therefore, find that the violations of Title VII of the Act herein charged were intentional within the terms of that statute.

We, therefore, conclude that as to the issues raised by Plaintiffs' Motion for Partial Summary Judgment, there is no genuine issue as to material fact and that summary judgment interlocutory in character should be entered on those issues.

Because the evidentiary materials show that at certain times subsequent to the effective date of the Act, or subsequent to the filing of the administrative charge or the within Complaint the Defendant has ceased or discontinued the discriminatory practice, injunctive relief is not appropriate as to those practices. Kober v. Westinghouse Elec. Co., supra, p. 250.

As to continuing practices which violate Title VII preliminary injunctive relief at this time is appropriate.

The question of other affirmative relief for past actions is not now before us. The Court is mandated to issue "such affirmative relief as may be appropriate". *Kober*, cit supra. This will depend upon the evidence to be presented on the individual claims, which may be considered at the time of trial of the "equal pay" issue not here considered.

IN THE UNITED STATES DISTRICT COURT

* * (Caption—72-169) * *

Now this *9th day of January, 1974*, Plaintiffs having moved for partial summary judgment on certain of the issues raised by the pleadings in this case, and having produced evidentiary materials in support of said motion, and the Defendant having responded, and the court having reviewed briefs and arguments of the parties and of the *amici curiae*.

The court finds that there is no genuine issue of material fact as to the issues hereinafter set forth, and that partial summary judgment, interlocutory in character, on the following issues of fact may be entered as a matter of law, it is

Therefore, Ordered, in accordance with the foregoing Opinion, that Defendant be found to have violated the provision of Title VII of the Civil Rights Act of 1964, 42 U. S. C. 2000(e) et seq., and Sec. 703(a)(91) of said Title VII, in that Defendant has failed or refused to hire and has otherwise discriminated against Plaintiffs and members of the class of female technical employees of the Claims Division of the Liberty Mutual Insurance Company because of their sex in the following respects:

1. From and after July 2, 1965 it failed and refused to hire otherwise qualified female applicants for the entry level position of "Claims Adjuster" in its Claims Department.

2. From and after July 2, 1965 it failed and refused to transfer or promote otherwise qualified female applicants from the position of "Claims Representative" to the position of "Claims Adjuster" in its Claims Department.

3. From and after July 2, 1965 it failed and refused to promote otherwise qualified female employees to the position of "Claims Supervisor" and positions superior to that position in its Claims Department.

4. That from and after July 2, 1965 the Defendant Company failed and refused to allow pregnant employees, otherwise able to perform the duties of their employment, to continue their employment beyond a certain term of their pregnancy, after which their employment was terminated.

5. That the violations of Title VII found in paragraphs 1 2, 3, and 4 above have ceased as a matter of Company practice and no injunctive relief with respect to these issues is appropriate.

6. That from and after July 2, 1965 the Defendant Company required female employees to return to work within three (3) months of delivery or within six (6) months of the start of maternity leave, or be dismissed from employment, without regard to their ability to perform the duties of their employment.

7. That from and after July 2, 1965 the Defendant Company denied the benefits of the disability income protection plan to female employees who otherwise met the conditions of the plan for any disability related to pregnancy or childbirth.

8. That the violations of Title VII recited in paragraphs 6 and 7 above are continuing violations and are the proper subject of injunctive relief. The court will consider the terms of any proposed preliminary injunctive order with respect to these violations submitted by the Plaintiffs in this case.

9. The questions of further appropriate relief to the individual Plaintiffs and members of their class will be determined by the court in further proceedings.

10. The question of liability and appropriate relief for the issue of equal pay for equal work between male and female employees is reserved for further proceedings.

Gerald J. Weber
United States District Judge

IN THE UNITED STATES DISTRICT COURT

* * (Caption—72-169) * *

MEMORANDUM AND AMENDED ORDER

On February 20, 1974 this court entered an Order in response to a Motion of Defendant for Reconsideration of its Order of January 9, 1974. In that Order we directed that final judgment be entered on the questions of defendants' maternity leave policy and income protection plan, there being no just reason for delay, in accordance with Fed. R. Civ. P. 54(b).

Because attention was forced on the maternity leave and disability income issue, the court made no such direction on the other finding of our Order of January 9, 1974.

Because Defendant has filed a Notice of Appeal, and because we do not believe that piecemeal appeals will advance the disposition of the within litigation we believe that the direction for entry of final judgment should include all issues determined in our Opinion and Order of July 9, 1974. We accordingly enter the following Amended Order.

AMENDED ORDER

AND NOW this *19th day of March, 1974*, the Order entered by this Court on February 20, 1974 is hereby AMENDED by the addition of the following:

It is further ORDERED AND DIRECTED that final judgment be ENTERED in favor of plaintiffs and the class which they represent that the defendant violated the provision of Title VII of the Civil Rights Act of 1964, 42 U. S. C. 2000(e) *et seq.* and § 703(a)(1) of Title VII in that defendant failed to [*sic*] refused to hire and has otherwise discriminated against plaintiffs and members of the class of female technical employees of the claims division of the Liberty Mutual Insurance Company because of their sex from and after July 2, 1965, by failing and refusing to hire otherwise qualified female applicants for the entry level position of claims adjuster in its claims department, by failing and refusing to transfer or promote otherwise qualified female applicants from the position of claims representative to the position of claims adjuster and by refusing and failing to promote otherwise qualified female employees to the position of claims supervisor and positions superior to that position and it is expressly DIRECTED that judgment be ENTERED upon these claims; there being no just reason for delay.

/s/ GERALD J. WEBER
Gerald J. Weber
United States District Judge

IN THE UNITED STATES DISTRICT COURT

• • (Caption—72-169) • •

MEMORANDUM ORDER ON PLAINTIFFS' MOTION TO DETERMINE CLASS ACTION

The Court has allowed limited discovery to proceed before determination of Plaintiffs' Motion for Class Action. Thereafter the parties submitted voluminous briefs and the court heard oral argument thereon.

From the pleadings, the evidentiary materials produced on discovery and the briefs of the parties we make the following determination.

(1) The class is so numerous that joinder of all members is impracticable

The plaintiffs allegedly represent all female employees over the nation in the claims department of defendant's business, past, present and future, since 1965. Defendant admits to employing about 700 female claims representatives alone in this category, disregarding females in other categories in this department.

(2) There are questions of law and fact common to the alleged class.

Plaintiffs aver a company-wide policy of discrimination directed toward females which eliminates females from holding certain positions and limits pay, promotions and benefits. The plaintiffs charge a common claim of discrimination against a class of persons of which they are a part. The questions of law and fact necessary to determine plaintiffs' rights are patently common to the class that they claim to represent; the existence of company-wide discriminatory employee practices based on sex.

(3) The claims of the representative parties are typical of the claims of the class.

Plaintiffs' claims are that they are subject to discrimination in employment practices because of their sex, and they allege that all members of their sex in the class of employees named are subject to the same discriminatory system. There is no conflict or antagonism between their claims and the claims of the class.

(4) The representative parties will fairly and adequately protect the interests of the class.

The essential element in this determination is the qualification, experience and ability of the attorneys representing the representative parties, and there is no doubt in the court's mind of their ability and energy as illustrated by the efforts demonstrated in the prosecution of this case to this date.

In addition to the above elements we find that the defendant has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final declaratory or injunctive relief with respect to the class as a whole. Claims of sexual discrimination are particularly appropriate for such determination.

Because the declaratory and injunctive relief demanded can only be of benefit to those members of the class who are presently employed, or who may be employed in the future, we believe that under the present state of the record we must limit the class to such employees. Because of high turnover and changes of name and residence through marriage, we believe that the inclusion of past employees would make the class unmanageable.

We believe that the class must be company-wide or nationwide in scope, covering all employees of the defendant in that class throughout the nation because of the allegation of a company-wide policy of sex discrimination.

It is, therefore, Ordered that Plaintiffs' Motion for determination of class action be Granted pursuant to the provisions of Fed. R. of Civ. P. 23(c)(1), and that the class represented by

plaintiffs include all present and future female technical employees in the defendant's claims department without limitation to territory in the entire geographical area where defendant does business.

This Order is made conditional, subject to further Order of this court, and may be altered, amended or revoked prior to a determination on the merits.

Pending notification to the class, neither plaintiffs or their counsel, nor defendant, nor its counsel shall solicit or otherwise contact the class concerning the pending litigation independently or in the absence of court approval. This Order shall not affect the rights of the parties or counsel to contact members of the class in the ordinary course of business or discovery.

Upon application of the parties or either party the court will consider the form and manner of notice which may be given to the class, or any part of it, as to any matter arising out of the conduct of this action as a class action.

So Ordered this 16th day of August, 1972.

/s/ GERALD J. WEBER
Gerald J. Weber
United States District Judge

IN THE UNITED STATES DISTRICT COURT

• • (Caption—72-169) • •

MEMORANDUM ORDER

In the above action we have been presented with a proposed form of notice to be given the members of the class as previously defined in our order of August 16, 1972. In that order we required that pending notification to the class neither the plaintiffs, nor their counsel, nor the defendant, nor its counsel, shall solicit or otherwise contact the class concerning the pending litigation in the absence of court approval.

An examination of the above order will disclose that no determination was made by the court that the present action should be maintained as a class action under Fed. R. of Civ. P. 23(b)(3). The court did not find that questions of law or fact common to the members to the class predominate over any questions affecting only individual members. In the present aspect of the case there is no evidence from which the court could make such a finding. While the present and the future female employees of the Claims Department of defendant company may be numerous, those of the class who have been met with a policy of discrimination in promotion or advancement must necessarily be far more limited than the entire class of employees. The injunctive relief available in an action brought under Fed. R. of Civ. P. 23(b)(2) may well be appropriate to the entire class of female employees of the Claims Department but any further question of remedy for members of the class must necessarily depend upon far more identification of the members of the class to whom the opportunity for promotion was denied on the basis of sex. While the complaint avers that the named plaintiffs and other members of their class have been discriminated against by defendant with respect to compensation, terms, conditions, privileges, and opportunities of employ-

ment, in paragraph 5 thereof, the specifications of such conduct in paragraph 11, in addition to items of unequal treatment of equally qualified men and women, also make allegations of failure to promote women to higher and better paying positions and failing to make available to women certain positions of advancement and promotion, and adopting unreasonable and arbitrary standards and conditions of advancement which discriminate against women.

It may well appear that there are two sub-classes of plaintiffs in this class action; those who are subjected to discriminatory standards or actions in the position that they now occupy, and those who have been denied promotion because of discriminatory standards. It would seem obvious, unless the defendant organization is one which has more chiefs than Indians, that the second class is a much smaller group than the first.

It will be noted that our Order of August 16, 1972 was conditional and subject to further order of the court. We believe that further evidentiary material may be required to be produced in order for the court to define more clearly the members of the class or the members of the proper sub-classes of employees.

We believe that counsel are overreaching in their attempt to have the proposed notice presented to this court circulated among the employees at this time. Before any notice is approved by this court we will have to consider further the proposition of the class or sub-class. The notice as presented to this court for approval contemplates a class action conducted under the provisions of Fed. R. of Civ. P. 23(b)(3) and the court deliberately made no such determination at the time of the hearing and order referred to above.

So Ordered this 14th day of September, 1972.

Gerald J. Weber
United States District Judge
/s/ GERALD J. WEBER

IN THE UNITED STATES DISTRICT COURT

• • (Caption—72-169) • •

MEMORANDUM ORDER ON PENDING MATTERS

Pursuant to a conference of counsel held on December 3, 1973 it appears to this court that certain determinations are now necessary for the orderly advancement of the above entitled litigation. Accordingly, the following pending matters will be considered herein:

(1) whether the class action shall proceed under Fed. R. Civ. P. 23(b)(2) or under Fed. R. Civ. P. 23(b)(3);

(2) what redefinition of the plaintiff class is now appropriate;

(3) whether, at what time and in what form, notice should be addressed to class members;

(4) plaintiffs' Motion for an Order Compelling Discovery filed December 3, 1973; and

(5) plaintiffs' Motion for Reconsideration filed December 3, 1973.

1.

This class action is at least arguably proper for treatment under either Rule 23(b)(2) or 23(b)(3). Rule 23(b)(2) is applicable because the defendant "has acted or refused to act on grounds generally applicable to the class" and the representative plaintiffs seek, among other remedies, "final injunctive relief or corresponding declaratory relief." Subdivision (b)(3) may also be applicable because of the presence of common questions of law and fact and because, in the judgment of this court, a class action is superior to any other available method for resolving the instant dispute with fairness and efficiency.

It may be argued that the primary purpose of this action is not the securing of injunctive or declaratory relief but is the recovery of money damages and, therefore, 23(b)(2) treatment

is inappropriate. Wright and Miller, addressing this question, suggest avoiding such disputes and, so long as the prerequisites of Rule 23(a) have been met, allowing the action to proceed under subdivision (b)(2). 7A Wright and Miller, Federal Practice and Procedure § 1775, p. 23 [1972 ed.]. In accord with this and the weight of other authority, it is hereby ORDERED that the class action, although proper for treatment under either subdivision (b)(2) or (b)(3), shall proceed under Rule 23(b)(2). See *Johnson* v. *City of Baton Rouge, Louisiana*, 50 F. R. D. 295, 300 [1970]; *Zachary* v. *Chase Manhattan Bank*, 52 F. R. D. 532, 534 [1971]; *Mungin* v. *Florida East Coast Railway Co.*, 318 F. Supp. 720, 730-731 [1970], affd. 441 F. 2d 728 [5th Cir. 1971]; 3B Moore's Federal Practice § 23.31[3], pp. 23-526, 527.

2.

The plaintiff class was first defined in this Court's Memorandum Order of August 16, 1972. It was there held that declaratory and injunctive relief could be of benefit only to present or future employees. Under the then existing state of the record it was thought that inclusion of past employees would render the class unmanageable. The problems considered included the turnover rate in defendant's female employees and changes of names and addresses through marriage. The court limited the class to all present and future female technical employees in defendant's claims department.

Plaintiffs' counsel now allege and defendant's counsel does not dispute that the entire class is not likely to include more than 2,500 persons even if past employees are included. After discovering that the defendant maintains records of the names and the last known address of its former employees, plaintiffs have moved for a redefinition of the class to add those past employees who can be located and identified by first class mail at the plaintiffs' expense.

The court's concern with the manageability of the class action is allayed by counsel representation of a maximum class

membership figure. Therefore, it is hereby ORDERED that the Memorandum Order of August 16, 1973 is AMENDED to add to the plaintiff class all former female technical employees of defendant who, on or after July 2, 1965, were employed in the defendant's claims department. Because no method of distribution or form of notice to the class has yet been approved it is not now necessary to adopt plaintiffs' suggested limitation that class members be located and identified.

It is ORDERED that the Memorandum Order of August 16, 1972 permitting plaintiffs, pursuant to Fed. R. Civ. P. 23(c)(1) to proceed with this action as a class action be AMENDED as follows with respect to the class therein defined:

The class represented by plaintiffs shall include all female technical employees who were, are, or will be employed in the defendant's claims department from and after July 2, 1965, without limitation to territory in the entire geographical area where defendant does business.

In all other respect the Memorandum Order of August 16, 1972 remains in full force and effect.

3.

Having determined that the action shall proceed as a class action under Fed. R. Civ. P. 23(b)(2), we see no immediate necessity of the class action notice required of actions proceeding under Fed. R. Civ. P. 23(b)(3), nor of the application of the provision which authorizes notice to a class member of his right to request exclusion from the class by a specified date.

However, Fed. R. Civ. P. 23 (b) (2) allows, if required for the protection of members of the class or otherwise for the fair conduct of the litigation, that notice be given in such manner as the court may direct to some or all of the members of the class of any step in the action.

The court, therefore, invites the application of counsel for approval of a form and method of distribution of such notice

as may be advisable at any stage of this action. Prior to such application counsel shall meet and confer with a view to reaching agreement as to the desirability, form and manner of distribution of such notice, and shall report to the court in such application the areas of agreement as well as any area of disagreement.

4.

Plaintiffs have moved to compel the production for examination of certain notes made by deposition witness Robert A. Penney contemporaneously with Mr. Penney's interviews with the named-plaintiffs representative parties. In accordance with the oral instructions of the court of the conference of counsel on December 3, 1973 it is ORDERED that defendant shall respond to Plaintiffs' Motion showing the cause, if any, why such production should not be ordered.

Defendant shall file said Response on or before *December 17, 1973.*

5.

Plaintiffs have also moved for reconsideration of our Order of November 27, 1972 which restricted Plaintiffs' discovery. On consideration of the Motion, the representations made therein, and the oral arguments made at the conference of December 3, 1973, it is ORDERED that: Defendant shall produce for inspection and copying by Plaintiffs' counsel all statements taken by Defendant from any member of the class defined herein and reduced to writing concerning the recruitment, hiring, employment, job description, compensation, maternity leave and health insurance benefits of employees from and after July 2, 1965. Defendant shall also produce for inspection by Plaintiffs' counsel the personnel file of any employee or former employee from whom such a statement was secured. The term "statement" as used herein shall include a written statement prepared or signed by said employee and any memorandum or summary of

a statement made or interview conducted which was summarized or reported in writing by any other person.

Otherwise, the restrictions of the Order of November 27, 1972 remain in effect. The court reserves for later determination when the need becomes apparent, Plaintiffs' request for production of the last known names and addresses of former female technical employees in Defendant's claims department.

So Ordered this 6th day of December, 1973.

/s/ GERALD J. WEBER
Gerald J. Weber
United States District Judge

RELEVANT STATUTORY PROVISIONS

FEDERAL RULES OF CIVIL PROCEDURE, RULE 23

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * * * *

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the

difficulties likely to be encountered in the management of a class action.

(c) *Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.*

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

d) *Orders in Conduct of Actions.* In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

* * * * *

TITLE VII, CIVIL RIGHTS ACT OF 1964, § 706

Sec. 706 (g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate . . .